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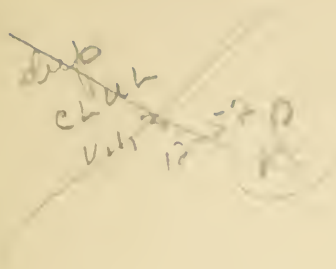

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A TREATISE

ON

THE AMERICAN LAW

OF

REAL PROPERTY

BY

EMORY WASHBURN, LL.D.

BUSSEY PROFESSOR OF LAW IN HARVARD UNIVERSITY; AUTHOR OF A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES

SIXTH EDITION

BY

JOHN WURTS, M.A., LL.B.

PROFESSOR OF THE LAW OF REAL PROPERTY IN THE YALE LAW SCHOOL
AUTHOR OF INDEX-DIGEST OF THE FLORIDA REPORTS

VOLUME I

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TO THE HONORABLE

JUSTICES OF THE SUPREME JUDICIAL COURT

OF MASSACHUSETTS,

TO WHOSE LABORS I AM INDEBTED FOR SO MUCH OF WHAT IS VALUABLE IN THE WORK, I DEDICATE THIS UNPRETENDING EFFORT TO ELUCIDATE A DEPARTMENT OF AMERICAN JURISPRUDENCE.

In doing this, I desire to add to the traditional veneration for this Court which I have shared in common with the people of the Commonwealth an expression of personal respect for its members, which the long intercourse into which I have been brought, since my admission to its bar, has served to develop, and constantly to strengthen.

Within that time, every one of its members has been changed. Men, the loved and the honored, have one after another passed away in the fulness of their fame, and others are now occupying their field of honorable labor; but illustrious as are the names that stand out upon its records among the great and good men of the Commonwealth, never have its laws been more ably, faithfully, and acceptably administered than by those who now occupy these seats of justice.

To bear my humble tribute to the official and personal qualities of the men who have in this field won and sustained the united respect of an appreciative public, I subscribe myself

Their obliged and obedient servant,

EMORY WASHBURN.

CAMBRIDGE, *July*, 1860.

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PREFACE

TO THE SIXTH EDITION.

In the preparation of this edition of Washburn on Real Property it was found advisable to take some liberties with the original text. With few exceptions, the changes have been made with a view to enhancing the practical utility of the work rather than with any idea of improving the scientific treatment of the subject, which has long been recognized as most admirable. The division into books and sections has been discarded. Valuable suggestions by Professor Alfred G. Reeves have served as a guide in making the few important rearrangements of the text. Slight changes in the wording of the text are not indicated; but all verbal changes of importance, for the sake either of clearness or of brevity, and all of the editor's original work, by way either of substitution or of addition, are shown by brackets. In citing authorities, great care has been used to include all the important decisions, made since the last edition of the work, which are in point. The editor is indebted to Mr. Charles Henry Harriman for a critical verification of every new case referred to. The compilations of statutes were made in large part by Messrs. Charles T. Lark and Edward H. Kelly.

J. W.

New Haven, Conn., *February*, 1902.

PREFACE

TO THE FOURTH EDITION.

To carry out the original purpose and design of the present work renders it necessary to add to or modify its statements and propositions, from time to time, to conform to the growth and progress of the law. It was intended to give a connected view of the law of Real Property as it prevails in the several States and under the Federal government, so far as it could be regarded American in its character. For this purpose, it was not only necessary to collect and collate the decisions of the State and Federal courts, but to make liberal reference to English reports and accredited treatises, and from these to form, so far as might be, a consistent and complete system of this department of the law.

If successfully accomplished, two objects would be attained: the profession and the student would be supplied with a work that seemed to be needed for use; and a process of assimilation among the laws of the different States would thereby be promoted, and the bonds of union between them gain strength by an identity of domestic institutions and popular thought.

Judging from the manner in which the work has been referred to by the various courts, it is believed that it has not wholly failed in either of these respects.

Since the publication of the last edition, some two thousand cases have been decided by the courts, which bear upon the subjects-matter of the work, by which, and other causes, changes and modifications of sufficient magnitude and importance in the existing rules of law have been wrought

to call for an effort to collect and embody these into the work as it had already been given to the public. An edition, therefore, which should embrace these cases, seemed to be a necessity, and has accordingly been prepared. Where these cases were in effect a re-statement of well-considered points of law, they have been referred to simply by name. But to such of them as contained new points, or presented a principle already familiar in an original or more elaborate form, have been assigned a more extended discussion and examination; and, in so doing, a statement of the facts and circumstances of particular cases has, at times, been adopted, which might, perhaps, seem, at first sight, more consistent with the idea of a digest than a summary treatise. Where this has been done, it has been for the purposes of illustration and explanation.

This accumulation of cases has arisen, in no small degree, from the fact that the laws of the different States differ essentially upon many subjects; and it is often as important to cite cases to show, that, upon a given point, the law of one State is not like that of another, as it is to state what the law of the former State, in fact, is. In this way, citations have often been multiplied upon a single point, beyond what, at first thought, might seem necessary or proper.

In the matter of the changes wrought by the legislation of the States, new statutes are so frequent, and often so arbitrary, and it is, at times, so difficult to get ready access to them, that, if errors in this respect should be detected, the cause may, perhaps, be accepted as an excuse. In collecting and digesting the cases cited from the reports, liberal use, so far as they extend, has been made of the "American Reports," — a selection made by Mr. Isaac Grant Thompson with excellent judgment and discrimination; while an earnest effort has been made, from other sources, to make the examination and collation of these reasonably complete.

To give some idea of the topics upon which new or subsidiary matter will be found in the following pages, there may be mentioned, as among them, homestead exemption; when and how far tenants may deny their landlords' titles; what force a landlord may apply in expelling a tenant; how far tenants are liable to others for injuries arising from the

condition of the premises in their occupancy; how far the tenant of one part of a dwelling-house can compel a tenant of another part to join in making repairs; whether the sale of growing trees and crops is within the 17th section of the statute of frauds; how far absolute deeds can be shown, by parol, to be only mortgages; the order in which owners of different parcels of mortgaged premises are chargeable in the redemption thereof; the validity of deeds, blanks in which have been filled after execution; what American rivers come under the category of navigable, and what are the boundary-lines of lands bordering upon them, and what of lands bounding by the sea, or by lakes and ponds; the power of courts to reform deeds, in order to correct mistakes; how far erecting and occupying up to division-fences affect the title to the adjacent lands; how far holding lands as partnership assets is a conversion of the same "out and out;" and how far one holding an easement of way can release or exchange it by parol.

With such materials, and the space they necessarily occupy in a work like this, it has been impossible to avoid expanding it considerably beyond its previous limits in its present form. But while it has been an aim in its composition to keep it within the narrowest compass, its main purpose has been to bring the work up to the present time, and to render it as accurate and complete as could be done by personal effort and attention.

CAMBRIDGE, *March*, 1876.

PREFACE

TO THE FIRST VOLUME OF THE FIRST EDITION.

The circumstances under which this work is now offered to the profession are briefly these: —

When called upon to state and illustrate to the classes of a law school, collected from almost every State in the Union, the leading principles of the Law of Real Property, the author was led to believe that there was a want to be supplied by a work, which, while it retained so much of the English common and early statute law as applied to this country, should combine with it, as a basis, the elements of American law as the same had been developed in the legislation and judicial decisions of the General and State governments, in order to form as nearly as might be one homogeneous system.

A conviction of the need of such a work, in the nature of an elementary treatise, strengthened with reflection, till the result has been an attempt to achieve it in the present volumes.

That to do this required the subject to be treated in some of its parts historically, and sometimes to refer to what had become practically obsolete, every intelligent reader will readily understand. The American statesman who should content himself with studying the simple text of the Constitution, without the light which English and Colonial history throws upon its provisions, would find himself at a loss to understand, or how to solve, many of the questions to which the construction of that instrument has given and is giving rise.

So the American lawyer would find still greater difficulty in understanding that great unwritten body of principles which

form the basis of the common law of nearly every State in the Union, if he could not go back historically to the coming in of the feudal system at the Conquest, read the charter of Runnymede in the light of the circumstances which surrounded it, and trace the gradual loosening of the bands of tenure before and at the passage of the statute *Quia Emptores*.

If the early English common law had no other application, a knowledge of it could not be dispensed with by a lawyer, as a means of understanding the terms and phrases in modern use, and as furnishing the elementary thoughts and opinions which have been and still are being wrought into the expanding and progressive systems of English and American jurisprudence.

The English Law of Real Property has undergone surprising changes within the last thirty years, whereby a process of assimilation in the systems of the two countries upon this subject has been going on, which is interesting to the American lawyer, and renders a knowledge of the laws of each the more important in the courts of this country.

Here was presented one of the most difficult problems in the prosecution of the present work. It seemed particularly desirable that it should not exceed two volumes of convenient size; while to compress into that space all that should be said of the English law, as well as of the statutes and decisions of thirty-one different States and governments, each related to, and yet independent of, the others, seemed, at first sight, an impracticable undertaking. How far the difficulty has been surmounted, the reader will determine.

It has been the intention of the writer to state no proposition as law which did not appear to be sustained by satisfactory authority. So far as the same could reasonably be done, those authorities have been cited. But, with all his precaution, this could not fail to load his pages with references; and he has contented himself, not unfrequently, with citing an elementary work of received authority to sustain a proposition, rather than to multiply the citations of cases which are to be found, if desired, in the elementary work referred to. In some instances, he has been obliged to rely upon the digest of

a reported case; but this has been done with caution, especially when the point to be stated or illustrated seemed to be new and doubtful. On the other hand, he has, in but a few instances, undertaken to give digests of reported cases. He has endeavored to state principles fully and clearly, and only for purposes of illustration has occupied space with a detail of the facts in the cases cited.

One thing he has had in view in the arrangement and filling up of his plan; and that was to satisfy the reader that the Law of Real Property, as a system, was, in most respects, symmetrical and complete. The popular notion, it is true, is, that this branch of the law is inevitably dry, intricate, and distasteful. But if its terms are less familiar, and its rules, from the remoteness of their origin, seemingly more arbitrary and artificial, and, as a whole, it is less flexible and easy to conform to the changing habits of a people than those of trade and commerce and the mere personal relations of society, it should not be forgotten, that, as a science, it altogether transcends those in exactness and certainty, and that many even of its subtleties disappear when the relations of its elements have been ascertained by study and investigation.

It should not be forgotten that it lies at the foundation of the English common law itself; that it was upon this sturdy stock that the laws and institutions of trading, manufacturing, commercial England were ingrafted, and are now in no small degree dependent for their element of vitality.

Nor should it be overlooked, that with the Saxon love of land, and the Norman love of dominion over the spot one calls his own, the law which regulates and enforces the rights of property in the soil will never cease to be of interest to a people in whose veins this common blood is mingled.

It has, moreover, been the field in which the keenest intellect and most profound learning of the best jurists of England and our own country have found ample scope and employment in grasping and analyzing its principles, mastering its subtleties, and testing and applying its rules.

It is not surprising, therefore, that so many writers have, from time to time, employed their best powers in the preparation of works embodying and illustrating the Law of Real

Property. Every age since Glanville has had its writers upon this subject, and no period has been more prolific than the present. No English treatise, of course, covers the same ground as was proposed to be done in the present; though it would be doing injustice to the treatise of Mr. Joshua Williams, and the notes on leading cases by Mr. Tudor, among the more recent of those works, if acknowledgment had not been made, as if often is in these pages, for the aid they have afforded in the preparation of this work. They will, moreover, show the use which has been made of the earlier treatises of Blackstone, Fearne, Cruise, Sanders, Flintoff, Sugden, Butler, Crabb, Preston, Burton, and others already familiar to the American lawyer. The work will show, besides, how far he has availed himself of the labors of American authors, whose aid, when resorted to, he has intended fully to acknowledge.

This attempt to produce a new work upon a hackneyed topic will not, it is hoped, render the writer obnoxious to the charge of presumption in view of the eminent ability of those who have gone before him. He hopes it may, at least, be found to possess the merit of being adapted to the wants of the American lawyer, as well as the American student; and if, in its composition, it is found to want the terseness and directness which might be derived from a strict adherence, at all times, to the use of technical terms and phrases, the reason for it might be traced to a wish to present the propositions it contains in language readily apprehended by the student.

Regarding the Law of Real Property as a system composed of several parts, yet substantially complete in itself, he has endeavored to arrange his topics with a due regard to their natural order of sequence, in relation to each other.

The work is divided into three books: the first embracing the nature and quantity of estates in corporeal hereditaments, with their qualities and characteristics, which will be found in the volume now published; the second treating of incorporeal hereditaments, their nature and characteristics; and the third, presenting in outline the titles by which real property may be acquired and held, and the rules of its transmission and transfer, will constitute a second volume.

It is subdivided into chapters, each intended to embrace a separate and distinct subject, with a subdivision in some cases into sections, with such a reference in the notes to the American statutes as to give the reader a tolerably full idea of the coincidence or diversity of the rules of the several States upon those subjects therein treated of.

It aims, in brief, to provide a safe and convenient book of reference to the lawyer; while it furnishes an elementary treatise for the use of the student, embracing what, in the form of lectures, has been received with favor by successive classes of the Law School, for which they were originally prepared.

From the encouragement he has received from both lawyers and students to undertake the work, he is induced to hope that it will be found, in some measure, to supply the want in which it originated.

Cambridge, *July*, 1860.

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LAW OF REAL PROPERTY.

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51. Vested, contingent, and executory estates.
52. Legal and equitable estates.

§ 1. **Right of Private Property.** — The right of exclusive enjoyment by some one individual, of portions of what might, at first, seem a common heritage, — the earth, and its products, — is too well settled as an elementary principle in the organization of society, to render it necessary to go behind the simple fact itself in discussing the laws of property.[1] This right of property, however, is so far limited, that its use may be regulated from time to time by law, so as to prevent its being injurious to the equal enjoyment by others of their property, or inconsistent with the rights of the community.[2]

§ 2. **Division into Real and Personal.** — The first great division of property is into Real and Personal. This distinction took its rise from the nature of the remedy anciently sought by one who had been deprived of its possession. In the case of lands, for instance, he recovered, if at all, the *real* thing lost. But for the abstraction of a chattel, his remedy was against the *person* who had taken it away.[3] And, though the line of distinction between these two classes of property might seem to be easily drawn, it will be found that property often assumes the one or the other character, according to the circumstances in which it is placed. Thus a house or a standing tree may acquire the incidents of personal estate, while

[1] 2 Bl. Com. 1–10.

[2] Commonwealth *v.* Tewksbury, 11 Met. 55; Commonwealth *v.* Alger, 7 Cush. 53, 86; Cushman *v.* Smith, 34 Me. 258; Bancroft *v.* Coolidge, 126 Mass. 438. There is a division of things which excludes the idea of separate individual property, such as air, running water, the sea, the sea-shore, etc. Bracton, c. 12, § 5.

[3] Wms. Real Prop. 7.

articles of a movable character may come to have qualities which belong to the realty, by the nature of the use to which they are fitted and applied.

§ 3. **Land is Realty — What the Term includes.** — [Land is always real property. It includes whatever, of natural origin, is growing upon it, as distinguished from those growths which originate in man's planting, or are annexed by transplanting; those substances which are added to the soil by natural causes, — not amounting to avulsion, — as alluvion,[1] an aerolite;[2]] whatever is contained within or beneath its surface, such as minerals and the like; [and, ordinarily, all growths and structures planted or built thereon by the hand of man:] upon the principle that *cujus est solum ejus est usque ad cælum* in the one direction, and *usque ad Orcum* in the other. The grant of land *eo nomine* will convey buildings and fences, the property of the grantor, as well as trees and herbage upon, or mines and quarries in, the ground.[3]

§ 4. **Fixtures — Real and Constructive Annexation.** — [But things upon the land which owe their origin or annexation to the direct agency of man may become a part of the realty, or may

[1] See *post*, § 1880 *et seq.*

[2] Goddard *v.* Winchell, 86 Iowa, 71; 2 Bl. Com. 17–19; 1 Law Mag. 271; Co. Lit. 4 a; Wms. Real Prop. 14; Broom's Maxims, 290. Ice forming on private water is the property of the owner of the bed below, and is generally regarded as real property. Edgerton *v.* Huff, 26 Ind. 35; State *v.* Pottmeyer, 33 Ind. 402; Washington Ice Co. *v.* Shortall, 101 Ill. 46. Ice formed on artificial ponds belongs to the owner of the overflowed soil and not to the pond owner. Bigelow *v.* Shaw, 65 Mich. 341, citing the authorities; s. c. 32 N. W. Rep. 800; s. c. 8 Am. St. Rep. 902. *Contra,* Mill River Co. *v.* Smith, 34 Conn. 462. Owing to its ephemeral character, a lessee may cut the ice as a right incidental to his tenancy. Marsh *v.* McNider, 88 Iowa, 390; s. c. 55 N. W. Rep. 469. In Michigan uncut ice is regarded as personal property. Higgins *v.* Kusterer, 41 Mich. 318; s. c. 2 N. W. Rep. 13. Ice formed on public waters becomes the property of the person gaining lawful access thereto and appropriating it, provided he do not thereby unreasonably interfere with the exercise of a similar right in others. Paine *v.* Woods, 108 Mass. 160; W. Roxbury *v.* Stoddard, 7 Allen, 158; Hittinger *v.* Eames, 121 Mass. 539; Gage *v.* Steinkrauss, 131 Mass. 222; Wood *v.* Fowler, 26 Kans. 682; Hickey *v.* Hazard, 3 Mo. App. 480; Woodman *v.* Pitman, 79 Me. 456; s. c. 18 Atl. Rep. 321; s. c. 1 Am. St. Rep. 312 and note. But in those States where the bed of a navigable stream belongs to the riparian proprietor, the ice is his. Washington Ice Co. *v.* Shortall, 101 Ill. 46; People's Ice Co. *v.* Steamer Excelsior, 44 Mich. 229; s. c. 6 N. W. Rep. 636; Lorman *v.* Benson, 8 Mich. 18.

[3] Per Bronson, J., Mott *v.* Palmer, 1 N. Y. 564, 572.

remain personal property, according to circumstances. Actual annexation occurs when a thing, apparently adapted to the permanent use of the land, is physically attached thereto. Constructive annexation occurs in the case of things unattached but necessary to the use of things attached so that they form a part thereof. Thus, the keys of a house, the belts in a mill, and other unattached parts of structures, have all been held to be annexed to the realty[1] as parts of the structures to which they belonged. Things annexed are fixtures.

§ 5. **Fixtures, how controlled by Intention.** — Whether a fixture becomes a part of the land and therefore realty, — "real fixture," — or remains personalty, — "chattel fixture," — depends, according to the prevailing American doctrine, upon the reasonable intention of the annexor at the time of the annexation. This intention is to be inferred from the nature, intended use, and mode of annexation of the fixture; the situation of the annexor and his relation to the fee; and the policy of the law.[2] Therefore,] if a man, by the per-

[1] Colegrave *v.* Dias Santos, 2 B. & C. 76; Walmsley *v.* Milne, 7 C. B. N. S. 115; Liford's Case, 11 Rep. 50; House *v.* House, 10 Paige, 158; McLaughlin *v.* Johnson, 46 Ill. 163. Iron bars and chains in a mill. Farrar *v.* Stackpole, 6 Me. 154.

[2] Capen *v.* Peckham, 35 Conn. 94; Voorhees *v.* McGinnis, 48 N. Y. 282; Parsons *v.* Copeland, 38 Me. 537; Hinkley Co. *v.* Black, 70 Me. 473; McConnell *v.* Blood, 123 Mass. 47; Allen *v.* Mooney, 130 Mass. 155; Smith Paper Co. *v.* Servin, id. 511; Southb. Sav. Bk. *v.* Exeter Works, 127 Mass. 542; Same *v.* Stevens Co., 130 Mass. 547; Hubbell *v.* E. Camb. Sav. Bk., 132 Mass. 447; Arnold *v.* Crowder, 81 Ill. 56; Seeger *v.* Pettit, 77 Penn. St. 437; Morris's Appeal, 88 Penn. St. 368; State Bk. *v.* Kercheval, 65 Mo. 682; Thomas *v.* Davis, 76 Mo. 72, citing Despatch Line *v.* Bellamy Co., 12 N. H. 205 (and holding Lathrop *v.* Blake, 23 N. H. 46, 66, to be controlled by Burnside *v.* Twichell, 43 N. H. 390, etc.); Centr. R. R. *v.* Fritz, 20 Kans. 430; Ottumwa Co. *v.* Hawley, 44 Iowa, 57; Hutchins *v.* Masterson, 46 Tex. 551; Dudley *v.* Hurst, 67 Md. 44; s. c. 8 Atl. Rep. 901. It is here held to be a question of intention chiefly as ascertained from the adaptability and actual adaptation of the articles, and from the relative situation of the parties, and that the mode of annexation is merely one element towards determining the intent. This intent is a question for the jury. Allen *v.* Mooney, *supra*. But it is the intent inferable at law from all the facts, and not the mere private intent of the party annexing. State Bk. *v.* Kercheval, *supra*, where a building on blocks was held a fixture and passed to a mortgagee because intended and used as an office for a brick mill on the premises, though the builder meant ultimately to remove it. In Hinkley Co. *v.* Black, *supra*, the rule laid down in McRea *v.* Centr. Bk., 66 N. Y. 489, that there should, besides adaptability and intention, be "actual annexation to the realty or something appurte-

mission of another, erect a house upon the other's land, it will, if the builder have no estate in the land, be the personal property of the builder, if such be his agreement with the landowner.[1] If a tenant of leased premises erect a structure thereon, appropriate to the character of his occupancy, he has within certain limitations a right to remove the same while

nant thereto," is denied, and it is said that annexation may be constructive as well as actual, and this is sustained by great preponderance of authority. Cases *supra*. Thus in New York, in the leading case of Snedeker *v.* Warring, 12 N. Y. 170, 178, a statue held in place only by its own weight was decided to be a fixture. So D'Eyncourt *v.* Gregory, L. R. 3 Eq. 382; and the "physical annexation" stated in Alvord Co. *v.* Gleason, 36 Conn. 86, as a requirement, was in Stockwell *v.* Campbell, 39 Conn. 362, 365, held satisfied by annexation by mere weight, and the better statement seems to be "permanent and habitual annexation." Strickland *v.* Parker, 54 Me. 263, 266. In Ewell, Fixt. 22, it is said, "The clear tendency of modern authorities gives prominence to the question of intention to make a permanent accession, etc., and the others derive their chief value as evidence of such intention." In the English courts, however, the question of the mode of annexation seems still held of prime importance; and the tests as stated by Parke, B., in Hellawell *v.* Eastwood, 6 Exch. 295, were quoted and followed in Turner *v.* Cameron, L. R. 5 Q. B. 306; Holland *v.* Hodgson, L. R. 7 C. B. 328, 337. A rule partly derived from these cases is suggested in Arnold *v.* Crowder, 81 Ill. 56, as follows: "That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to show that they were intended to be part of the land; and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that the article was all along intended to continue as a chattel."

[1] Dudley *v.* Hurst, 67 Md. 44; s. c. 8 Atl. Rep. 901; Aldrich *v.* Parsons, 6 N. H. 555; Osgood *v.* Howard, 6 Me. 452; Russell *v.* Richards, 10 Me. 429; commented on in Hinkley Co. *v.* Black, 70 Me. 473; Lapham *v.* Norton, 71 Me. 83; Dame *v.* Dame, 38 N. H. 429; Korbe *v.* Barbour, 130 Mass. 255. The agreement may be in terms, Wall *v.* Hinds, 4 Gray, 256, 273; Ham *v.* Kendall, 111 Mass. 297; Dame *v.* Dame, *supra;* or it may be implied from the relation of landlord and tenant, Doty *v.* Gorham, 5 Pick. 487; Washburn *v.* Sproat, 16 Mass. 449; Antoni *v.* Belknap, 102 Mass. 193; Morris *v.* French, 106 Mass. 326; Van Ness *v.* Pacard, 2 Pet. 137; Dubois *v.* Kelly, 10 Barb. 496; or from a renunciation of title by the landowner, Wells *v.* Banister, 4 Mass. 514, or from his agreement to buy from the builder and the like, Ashmun *v.* Williams, 8 Pick. 402; or the nature of the article annexed, the relative situation of the parties and of their property, Wood *v.* Hewett, 8 Q. B. 913; Lancaster *v.* Eve, 5 C. B. N. S. 717; Korbe *v.* Barbour, *supra*. "As between landlord and tenant, or one in temporary possession of lands under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures annexed for a purpose connected with the temporary possession." Wiggins Ferry Co. *v.* O. & M. Ry., 142 U. S. 396, 415; Ingalls *v.* St. Paul Ry. Co., 39 Minn. 479; s. c. 40 N. W. Rep. 524; Merchants' Nat. Bank *v.* Stanton, 55 Minn. 211; s. c. 56 N. W. Rep. 821.

in possession of the premises.[1] If the builder, however, have a permanent interest in the land, such as the husband of the tenant in fee,[2] or reversioner or remainder-man has,[3] or be in possession under a contract of purchase,[4] or if his intent be otherwise referable to a permanent holding, the structure becomes at once a part of the realty.[5] [The fact that the builder believed himself at the time to be entitled to the permanent possession of the premises, under a title legal or equitable, is indicative of his intention to make a permanent annexation.] It is a maxim of the law, *quicquid plantatur solo, solo cedit.*[6]

§ 6. **Fixtures, how affected by Conveyance.** — If the building, or a permanent fixture, be erected upon, or attached to the realty by the owner of it, and intended to remain, it is not the subject of conveyance as personalty, even by the owner of the freehold. And a mortgage of it by him, as personal property, without actual severance, will not be valid against a purchaser of the freehold. In one case, A, the owner of land, by an arrangement between himself and B, built a barn on his own land, which he set upon stone posts, and B was to hire the same, and upon paying for it was to have a right to remove

[1] Van Ness *v.* Pacard, 2 Pet. 137 ; Hanrahan *v.* O'Reilly, 102 Mass. 201, which was the case of bowling-alleys erected by the tenant and removed during the term. In Antoni *v.* Belknap, 102 Mass. 193, a tenant for an uncertain period, who had erected buildings, was held to have a right to remove them within a reasonable time after the landlord had determined the tenancy. The limitations are, in general terms, that the structure shall be for the purpose of trade, agriculture, and the like. Ewell, Fixt. 80 *et seq.*

[2] Glidden *v.* Bennett, 43 N. H. 306. See Washburn *v.* Sproat, 16 Mass. 449. Though that more properly goes on the inability of husband and wife to contract with each other. Webster *v.* Potter, 105 Mass. 414.

[3] Cooper *v.* Adams, 6 Cush. 87. And where a tenant buys in the reversion he loses his tenant's privilege of removal, as against an existing mortgage. Jones *v.* Detroit Chair Co., 38 Mich. 92 ; Perkins *v.* Swank, 43 Miss. 349 ; *contra*, Globe Mills *v.* Quinn, 76 N. Y. 23.

[4] Eastman *v.* Foster, 8 Met. 19 ; Ogden *v.* Stock, 34 Ill. 522; Poor *v.* Oakman, 104 Mass. 309 ; Hemenway *v.* Cutter, 51 Me. 407 ; Pomeroy *v.* Bell, 118 Cal. 635 ; s. c. 50 Pac. Rep. 683 ; and the cases of Russell *v.* Richards, 10 Me. 429; s. c. 11 Me. 371 ; Pullen *v.* Bell, 40 Me. 314, apparently *contra*, are explained and limited by Hinkley Co. *v.* Black, 70 Me. 473.

[5] Leland *v.* Gassett, 17 Vt. 403 ; Lipsky *v.* Bergman, 52 Wis. 256 ; Ritchmeyer *v.* Morse, 3 Keyes, 349 ; Christian *v.* Dripps, 28 Penn. St. 279.

[6] Bracton, 10 ; Broom, Max. 295.

it. A sold the land to C, who, by parol, agreed that the barn should not pass by the deed. C sold the land to another, but said nothing of the barn. It was held that the title to the barn passed with the real estate unaffected by the parol agreement under which it was built.[1] But a freeholder can make a valid sale of buildings and other fixed property to be immediately severed and removed.[2] [Sales of real fixtures, however, are now generally considered to be within the fourth section of the statute of frauds; certainly as against subsequent purchasers of the land.[3]] If a building be erected without the assent and agreement of the landowner, it becomes at once a part of the realty, and is the property of the owner of the freehold.[4] [This is so even where the builder believes himself to be the owner of the land; although, in an action for mesne profits, the value of the improvements may be recouped to the extent of the damages.[5] The rights of a *bona fide* possessor of land, who is ejected, as to his improvements, are now largely regulated by statute.[6]] So where a house has stood upon land for thirty years, it was held to have become a real fixture, and

[1] Burk *v.* Hollis, 98 Mass. 55; Webster *v.* Potter, 105 Mass. 414; Landon *v.* Platt, 34 Conn. 517; Bonney *v.* Foss, 62 Me. 281; Richardson *v.* Copeland, 6 Gray, 536; Gibbs *v.* Estey, 15 Gray, 587; Deane *v.* Hutchinson, 40 N. J. Eq. 83.

[2] Shaw *v.* Carbrey, 13 Allen, 462; Nelson *v.* Nelson, 6 Gray, 385; Hallen *v.* Runder, 1 C. M. & R. 266; Marshall *v.* Green, 1 C. P. Div. 35; Tyson *v.* Post, 108 N. Y. 217; s. c. 15 N. E. Rep. 316; Carpenter *v.* Medford, 99 N. C. 495; s. c. 6 S. E. Rep. 785. But such a sale, to be valid, must be for removal. It would seem that the intention to remove permits a transfer of ownership by parol, completing the severance.

[3] Meyers *v.* Schemp, 67 Ill. 469; Hutchins *v.* Masterson, 46 Tex. 551; Brown *v.* Roland, 92 Tex. 54; s. c. 45 S. W. Rep. 795. As to sales of standing trees under the statute of frauds, see post, § 16.

[4] Sudbury Parish *v.* Jones, 8 Cush. 184; Poor *v.* Oakman, 104 Mass. 309, 317; Webster *v.* Potter, 105 Mass. 414, 416; Howard *v.* Fessenden, 14 Allen, 124; Oakman *v.* Dorch. F. I. Co., 98 Mass. 57; Leland *v.* Gassett, 17 Vt. 403; Bonney *v.* Foss, 62 Me. 248; Guernsey *v.* Wilson, 134 Mass. 486; Crest *v.* Jack, 3 Watts, 239; West *v.* Stewart, 7 Penn. St. 122. So a railroad erecting a depot on land, or annexing rails thereto, without the consent of the owner, or condemnation of the land or tender of damages, loses title to what is so annexed. Meriam *v.* Brown, 128 Mass. 391. But upon subsequent condemnation proceedings, the owner will not be entitled to have the value of the fixtures estimated in the damages. Lewis on Eminent Domain, 507 and cases cited; J. T. & K. W. Ry. Co. *v.* Adams, 28 Fla. 631; s. c. 10 So. Rep. 465; *contra*, Graham *v.* Connellsville R. R. Co., 36 Ind. 463.

[5] 2 Kent's Com. 334; Malone on Real Prop. Trials, 137 *et seq.*

[6] Ibid.

might not be removed without the consent of the owner of the soil.[1] So if a tenant at will removes a house on the premises, and places it on a cellar with a stone foundation, he makes it a part of the freehold, and a mortgage of it by him as personalty passes no title.[2] So where one, pending a suit to try the title to land, erected a house thereon by permission of the defendant in suit, it was held that the former could not remove it against the will of the plaintiff, who prevailed in the suit.[3] So fixtures attached to premises by one in possession under a contract of purchase, where he fails to perform on his part and thereby to acquire a title, become a part of the realty, like fixtures annexed by a vendor or mortgagor, and may not be removed by him.[4]

§ 7. **Tortious Removal — Remedy.** — [For real fixtures, unlawfully removed from the freehold, the owner may maintain trover,[5] or replevin if the property is identifiable and has not been annexed to realty.[6] And in order that a chattel wrongfully annexed, by one not the owner, shall become a real fixture as against the owner, so that he cannot maintain replevin for it, it must have lost its legal identity as a chattel, whicho ccurs where it cannot be removed without injury to the freehold.[7] Moreover, annexation will not occur as the result of accident or disaster.[8]]

[1] Reid *v.* Kirk, 12 Rich. 54.

[2] Madigan *v.* Macarthy, 108 Mass. 376.

[3] Henderson *v.* Ownby, 56 Tex. 647. So Hubschman *v.* McHenry, 29 Wis. 655, where the builder relied on the permission of one holding a tax title subsequently adjudged bad. The earlier case of McJunkin *v.* Dupree, 44 Tex. 500, which permitted removal of a cotton gin and stand, proceeded rather on the ground that the articles were not fixtures, Cole *v.* Reach, 37 Tex. 413 ; and is distinguished in 56 Tex. 647, *supra.* And see Campbell *v.* Roddy, 44 N. J. Eq. 244 ; s. c. 14 Atl. Rep. 279.

[4] McLaughlin *v.* Nash, 14 Allen, 136 ; Daggett *v.* Tracy, 128 Mass. 167; Westgate *v.* Wixon, 128 Mass. 304 ; Hinkley Co. *v.* Black, 70 Me. 473, where the text is cited.

[5] Bank *v.* Emerson, 15 Mass. 159 ; Westgate *v.* Wixon, 128 Mass. 304 ; McNally *v.* Connolly, 70 Cal. 3 ; s. c. 11 Pac. Rep. 320.

[6] Ogden *v.* Stock, 34 Ill. 522 ; Reese *v.* Jared, 15 Ind. 142 ; Sands *v.* Pfeiffer, 10 Cal. 258 ; Laflin *v.* Griffiths, 35 Barb. 58 ; Dubuque Society *v.* Fleming, 11 Iowa, 533 ; Michigan Mut. L. Ins. Co. *v.* Cronk, 93 Mich. 49 ; s. c. 52 N. W. Rep. 1035. In Centr. R. R. *v.* Fritz, 20 Kan. 430, Eaves *v.* Estes, 10 Kan. 314, Mills *v.* Redick, 1 Neb. 437, replevin was held to lie after annexation.

[7] 2 Kent's Com. 362 ; Cross *v.* Marston, 17 Vt. 533 ; Shoemaker *v.* Simpson, 16 Kan. 43 ; and see Ewell on Fixt. 57.

[8] Livezey *v.* Philadelphia, 64 Penn. St. 106.

§ 8. **Houses as Fixtures.**— While a house standing upon mortgaged premises belonging to the owner of the soil is a part of the realty, and passes with it; yet in those States where a mortgage is a lien upon, and not an estate in the land, if the mortgagor in possession, and before breach, separate the house from the land, or if he cut trees growing thereon, and carry them away, the mortgagee cannot follow them to claim them.[1] So if the house be built by one man upon the land of another, by the consent of the latter, and he sell the land, though it does not pass a property in the house, it would operate as a revocation of the license under which the builder placed it there. The owner may always remove it after notice of a revocation of such license, if done within a reasonable time.[2] Or he might sell it by oral agreement without writing.[3] Nor would it make any difference if the owner of the land himself builds the house, if he do so for another who pays him for the same with a right to remove it.[4] But where a building is erected upon the land of another under an agreement that the builder may remove it, it will remain his personal property; nor would a sale of the realty, under process of bankruptcy against the landowner, pass any title to the building.[5] So where A, by permission of B, built a mill on B's land under an agreement to purchase the land as soon as B should have paid an outstanding judgment which formed a lien upon it, and in the mean time to own the mill, and B having failed to satisfy the judgment, the land was sold, it was held that the mill remained A's personal property, and did not pass with the estate.[6] A steam saw-mill may be personal property though standing on another's land, and may be liable as such for the owner's debts,[7] and this although it was origi-

[1] Buckout *v.* Swift, 37 Cal. 433. But it is otherwise after breach. Sands *v.* Pfeiffer, 10 Cal. 258. And in New York the rule between mortgagor and mortgagee is declared to be the same as between vendor and vendee. Lallin *v.* Griffiths, 35 Barb. 58; Snedeker *v.* Warren, 12 N. Y. 170, 174.

[2] Dame *v.* Dame, 38 N. H. 429.

[3] Keyser *v.* School District, 35 N. H. 477.

[4] Coleman *v.* Lewis, 27 Penn. St. 291.

[5] Goodman *v.* Han. & St. J. R. R., 45 Mo. 33; Morris *v.* French, 106 Mass. 326; Howard *v.* Fessenden, 14 Allen, 124.

[6] Yater *v.* Mullen, 24 Ind. 277.

[7] State *v.* Bonham, 18 Ind. 233.

nally placed there conditionally, if the owner of the land shall have failed to perform his part.[1]

§ 9. **Fixtures — Rights of Bona Fide Purchasers of the Land.** —[But when the owner of land annexes thereto the chattel of another, although its identity as a chattel may be preserved in favor of its owner, yet such identity will become lost and the chattel will acquire its proper character of an irremovable fixture in favor of a subsequent purchaser or mortgagee of the land without notice of the facts. This is true whether the annexed chattel was hired by the landowner, or was purchased by him upon conditional sale, the title to remain in the vendor until the purchase price should be paid, or was subject to a prior chattel mortgage.[2] But purchasers or mortgagees with notice take subject to the real ownership of the chattel.[3] Upon a conveyance of land, a parol exception of the real fixtures is ineffectual,[4] as being a parol variation of the deed.]

§ 10. **Removal of Fixtures by Mortgagor.** — Where a mortgage creates an estate in the land, and the mortgagor removes

[1] Yater *v.* Mullen, 23 Ind. 562.

[2] Fryatt *v.* Sullivan Co., 5 Hill, 116; Pierce *v.* Goddard, 22 Pick. 559; Stillman *v.* Flenniken, 58 Iowa, 450; s. c. 10 N. W. Rep. 842; Hunt *v.* Bay State Iron Co., 97 Mass. 279; Curtis *v.* Riddle, 7 Allen, 185; Pierce *v.* George, 108 Mass. 78; Southbr. Sav. Bk. *v.* Exeter Wks., 127 Mass. 542; Same *v.* Stevens Co., 130 Mass. 547; Hopewell Mills *v.* Taunton Savings Bk., 150 Mass. 519; s. c. 23 N. E. Rep. 327; Cross *v.* Com. Co., 153 Ill. 499; s. c. 38 N. E. Rep. 1038; State Bk. *v.* Kercheval, 65 Mo. 682; Smith *v.* Waggoner, 50 Wis. 155, 161; Walmesley *v.* Milne, 7 C. B. N. S. 115; Morrison *v.* Berry, 42 Mich. 389; Wickes *v.* Hill, 115 Mich. 333; s. c. 73 N. W. Rep. 375; Palmateer *v.* Robinson, 60 N. J. L. 433; s. c. 38 Atl. Rep. 957; Tibbetts *v.* Horne, 65 N. H. 242, holding that the record of a chattel mortgage is not notice of title under such circumstances; s. c. 23 Atl. Rep. 145; to the same effect, Ice Co. *v.* Lone Star Works, 15 Tex. Civ. App. 694; s. c. 41 S. W. Rep. 835; 1 Jones on Chat. Mtg. 134, 135.

[3] Snowden *v.* Craig, 26 Iowa, 156; Tifft *v.* Horton, 53 N. Y. 377; Arlington Mill Co. *v.* Yates, 57 Neb. 286; s. c. 77 N. W. Rep. 677. The rule is otherwise in Alabama. Adams *v.* Interstate B. & L. Asso., 119 Ala. 97; s. c. 24 So. Rep. 857. So far as the New York cases are *contra*, they may proceed on the ground that in that State a mortgage is a lien and not an estate. Tifft *v.* Horton, 53 N. Y. 377. So see Hendy *v.* Dinkerhoff, 57 Cal. 3. Where, however, the chattel owner was deprived of it by fraud or without his consent, his title is not divested by its annexation. Cochran *v.* Flint, 57 N. H. 514; D'Eyncourt *v.* Gregory, L. R. 3 Eq. 382, 397.

[4] Landon *v.* Platt, 34 Conn. 517; Bond *v.* Coke, 71 N. C. 97; Conner *v.* Coffin, 22 N. H. 538; Smith *v.* Price, 39 Ill. 28; and see McLaughlin *v.* Johnson, 46 Ill. 163; Ripley *v.* Paige, 12 Vt. 353.

fixtures from the premises, the mortgagee may have trespass against him, or if he sell them to a third person, the mortgagee may require the purchaser to pay him for them. Nor would it make any difference if the fixtures were parts of a building which had been destroyed, and which had been saved, such as doors, window-blinds, and the like.[1]

§ 11 **Crops, their Property Character.** — [A conveyance of the realty carries growing annual crops[2] and nursery trees[3] planted by the grantor and owned by him. But crops that are ripe and ready for harvest will not, being unmentioned in the deed, pass thereby as realty.[4] A devise carries the growing crops.[5] But crops, whether fit for harvesting or not, go to the personal representatives of the decedent, if needed to pay debts; so that they belong primarily to the executor as personal property, but if not taken by him they go to the heir or devisee as real property.[6]] And when crops have been sold standing, by a valid sale, and the title has passed, the purchaser has a reasonable time after they are ripe to gather them; nor can the landowner interfere with them until after such time.[7] Indeed it seems well settled in this country, notwithstanding some earlier cases in England, that growing annual crops, as well as those ripe already, can, as *fructus industriæ*, be the subject of a valid oral sale by the owner, with an implied license to the vendee to enter and take them.[8] So if such crops are

[1] Wilmarth *v.* Bancroft, 10 Allen, 348.

[2] Falmouth *v.* Thomas, 1 Cr. & M. 89; Mechelen *v.* Wallace, 7 Ad. & E. 49; Vaughan *v.* Hancock, 3 C. B. 766; Brantom *v.* Griffits, 1 C. P. Div. 349; Bank of Penn. *v.* Wise, 3 Watts, 394, 406; Wintermute *v.* Light, 46 Barb. 278, 283; Bull *v.* Griswold, 19 Ill. 631; *contra*, Smith *v.* Johnston, 1 Penn. 471; Willis *v.* Moore, 59 Tex. 628. See *post*, § 1044; also Thayer *v.* Rock, 13 Wend. 53.

[3] Smith *v.* Price, 39 Ill. 28; Kittredge *v.* Woods, 3 N. H. 503; Tripp *v.* Hasceig, 20 Mich. 254, 261; though one judge, dissenting, held that the field was the storehouse of the crop; as to which see Parker *v.* Staniland, 11 East, 362.

[4] First Nat. Bk. *v.* Beegle, 52 Kan. 709; s. c. 35 Pac. Rep. 814.

[5] Bradner *v.* Faulkner, 34 N. Y. 347; Dennett *v.* Hopkinson, 63 Me. 350.

[6] Penhallow *v.* Dwight, 7 Mass. 34; Kingsley *v.* Holbrook, 45 N. H. 313, 319; Howe *v.* Bachelder, 49 N. H. 204; Pattison's App., 61 Penn. St. 294; Stall *v.* Wilbur, 77 N. Y. 158.

[7] Ogden *v.* Lucas, 48 Ill. 492; Stewart *v.* Doughty, 9 Johns. 108, 112.

[8] See Evans *v.* Roberts, 5 B. & C. 829; Jones *v.* Flint, 10 Ad. & E. 753; Sainsbury *v.* Matthews, 4 M. & W. 343; overruling Emmerson *v.* Heelis, 2 Taunt. 38; Waddington *v.* Bristow, 2 B. & P. 452. So see Craddock *v.* Riddlesburger, 2 Dana,

planted by a tenant who holds under the owner of the soil, and are fit for harvesting, or by one whose tenancy is for an uncertain period of time, they are regarded, in many respects, as personal property, liable, indeed, to become part of the realty, if the tenant voluntarily abandons or forfeits possession of the premises.[1] And by this principle, where one entered upon land under an agreement of the owner to sell it to him, and planted crops, and then the landowner refused to execute his agreement to convey, it was held that the tenant might claim the crops as personalty.[2] Where, during the pendency of a process to foreclose a mortgage, the mortgagor let the premises to a tenant who raised a crop upon the same, and the crop had been cut and stacked upon the land when the premises were sold to foreclose the mortgage, and the purchaser at this sale took the crops and carried them away, he was held liable in trespass therefor to the tenant as owner of the crop.[3] Where a tenant in the autumn sowed a crop of barley, and in the following spring gave up possession to a new tenant, who took charge of the crop for him, it was held that a mortgage of the crop by the first tenant, while the premises were in possession of his successor, was valid to pass the same.[4]

§ 12. **Crops, continued — Nursery Trees.** — [But one who plants crops pending an action of ejectment does so at his peril, for if the adverse claimant prevail, he will take the crops as a part of the land.[5] At common law, and generally in this country, all annual crops, irrespective of their state of maturity, whether planted by a tenant or by the owner of the soil, may be levied on as personal property ;[6] but in Massachusetts[7]

205 ; Stambaugh *v.* Yeates, 2 Rawle, 161 ; Dunne *v.* Ferguson, 1 Hayes, 540 ; Pattison's App., 61 Penn. St. 294 ; Whipple *v.* Foot, 2 Johns. 423 ; Green *v.* Armstrong, 1 Denio, 550 ; Howe *v.* Bachelder, 49 N. H. 204 ; Owens *v.* Lewis, 46 Ind. 488.

[1] Oland's Case, 5 Rep. 116 *a* ; Debow *v.* Titus, 5 N. J. 128 ; Co. Lit. 55 ; Whipple *v.* Foot, 2 Johns. 418, and 421, n. ; Chandler *v.* Thurston, 10 Pick. 210.

[2] Harris *v.* Frink, 49 N. Y. 24, 30.

[3] Johnson *v.* Camp, 51 Ill. 220.

[4] Fry *v.* Miller, 45 Penn. St. 441.

[5] McLean *v.* Bovee, 24 Wis. 295 ; McGinnis *v.* Fernandes, 135 Ill. 69 ; s. c. 26 N. E. Rep. 109 ; Rowell *v.* Klein, 44 Ind. 290 ; Gardner *v.* Kersey, 39 Ga. 664 ; Carlisle *v.* Killebrew, 89 Ala. 329 ; s. c. 6 So. Rep. 756.

[6] 8 A. & E. Ency. of Law (2d ed.), 308.

[7] And here the attaching officer must harvest the crop and take it into his

and Iowa[1] execution levies are restricted to mature crops. As between grantor and grantee of the land, crops planted by the vendor are regarded as realty, and pass to the grantee unless specially reserved.[2] And the rule is the same for nursery trees.[3]

§ 13. **Trees — Perennial Growths — Fruit.** — Growing trees become constructively severed from the freehold and converted into personalty if sold, or if, upon sale of the land, reserved, to be cut and removed.[4] If the owner of such trees die before cutting them, they go to his personal representatives and not to his heir.[5] And nursery trees planted by a tenant having less than a freehold estate in the land, remain personal property;[6] the intention of the planter governing, as in the case of other fixtures annexed by such tenant. All perennial growths, including bushes and grasses and the fruit of trees, are part of the realty, unless actually or constructively severed therefrom; and the foregoing statements as to trees apply to them as well.[7]]

§ 14. **Trees — Rights of Adjacent Landowners.** — Trees which stand wholly within the boundary line of one's land belong to him, although their roots and branches may extend into the adjacent owner's land. And such would be the case in respect to the ownership of the fruit of such trees, though grown upon the branches which extend beyond the line of the owner's land.[8] And trespass for assault and battery would lie by the owner of the tree against the owner of the land over which its

possession to make the levy valid. Heard *v.* Fairbanks, 5 Met. 111; Penhallow *v.* Dwight, 7 Mass. 34.

[1] Ellithorpe *v.* Reidesil, 71 Iowa, 315; s. c. 32 N. W. Rep. 238.

[2] 8 A. & E. Ency. of Law (2d ed.), 307, where are also collated the authorities which hold that a parol reservation of the crops by the grantor is valid.

[3] Smith *v.* Price, 39 Ill. 28.

[4] Claflin *v.* Carpenter, 4 Met. 580; Smith *v.* Surman, 9 B. & C. 561; Stukely *v.* Butler, Hob. 173. See 1 Atk. 175; Olmstead *v.* Niles, 7 N. H. 522; Liford's Case, 11 Rep. 50; Marshall *v.* Green, 1 C. P. Div. 35.

[5] McClintock's Appeal, 71 Penn. St. 365.

[6] Miller *v.* Baker, 1 Met. 27; Whitmarsh *v.* Walker, 1 Met. 313; Penton *v.* Robart, 2 East, 88; Windham *v.* Way, 4 Taunt. 316, per Heath, J.; Coombs *v.* Jordan, 3 Bland's Ch. 284, 312.

[7] Matter of Chamberlain, 140 N. Y. 390; s. c. 35 N. E. Rep. 602; Sparrow *v.* Pond, 49 Minn. 412; s. c. 32 Am. St. Rep. 571 and note; s. c. 52 N. W. Rep. 36.

[8] Lyman *v.* Hale, 11 Conn. 177; Skinner *v.* Wilder, 38 Vt. 115.

branches extended, if he prevented the owner of the tree, by personal violence, from reaching over and picking the fruit growing upon these branches, while standing upon the fence which divided the parcels.[1] But the adjacent owner may lop off the branches or roots of such trees up to the line of his land.[2] If the tree stands so nearly upon the dividing line between the lands that portions of its body extend into each, the same is the property in common of the landowners. And neither of them is at liberty to cut the tree without the consent of the other, nor to cut away the part that extends into his land, if he thereby injures the common property in the tree.[3]

§ 15. **Trees as Realty — Nursery Trees.** — Trees growing upon land constitute a portion of the realty, and pass by a mortgage of the land, and the mortgagee could not otherwise sell them to another, than the land itself.[4] So they cannot be levied on, on a *fi. fa.* or personal property execution.[5] And if nursery trees are planted by the owner of the land, they would pass by a mortgage of the land, though planted after the mortgage is made.[6] A different rule would apply between landlord and tenant if they were planted by the tenant for purposes of trade.[7] Trees cut and lying upon the soil, as well as trees thrown down by the wind, would pass with the land as a part of the realty. It would be otherwise if the trees had been cut into logs or hewed into timber.[8]

§ 16. **Trees — Statute of Frauds.** — [Trees (not nursery trees planted by a tenant) are land, a sale of which, to be valid under the fourth section of the statute of frauds, must be evidenced by deed, unless the sale is for immediate removal.[9]

[1] Hoffman *v.* Armstrong, 48 N. Y. 201.

[2] Grandona *v.* Lovdal, 70 Cal. 161; s. c. 11 Pac. Rep. 623.

[3] Dubois *v.* Weaver, 25 N. Y. 123; Waterman *v.* Soper, 1 Ld. Raym. 737; Skinner *v.* Wilder, 38 Vt. 115; Lyman *v.* Hale, 11 Conn. 177; Griffin *v.* Bixby, 12 N. H. 454; Masters *v.* Pollie, 2 Roll. Rep. 141; Holder *v.* Coates, Moody & M. 112; 3 Kent, Com. 438.

[4] Hutchins *v.* King, 1 Wall. 53, 59.

[5] Adams *v.* Smith, Breese, 221.

[6] Maples *v.* Millon, 31 Conn. 598; Price *v.* Brayton, 19 Iowa, 309; Adams *v.* Beadle, 47 Iowa, 439.

[7] Price *v.* Brayton, *supra.*

[8] Bracket *v.* Goddard, 54 Me. 309, 313; Cook *v.* Whiting, 16 Ill. 480.

[9] McGregor *v.* Brown, 10 N. Y. 114; Green *v.* Armstrong, 1 Denio, 550; Car-

This is the general rule in this country; but some courts have given effect to an oral sale of standing trees by treating it as a license which becomes irrevocable as soon as the trees are cut, thus passing the title.[1] Such license is revoked so that no title can pass to the licensee by such sale, by the death of the licensor,[2] or by a sale of the land to a purchaser without notice of such license.[3] But once the title to standing trees becomes vested in another than the owner of the soil, subject to the exception noted in the next section, a constructive severance takes place, and they become personal property, the title to which may be passed without the formality of a deed.[4] And an oral sale of standing trees for immediate removal is held to work a constructive severance vesting the title in the purchaser.[5]]

§ 17. **Trees may be Realty although severed.** — But if the owner of land grants the trees growing thereon to another and his heirs, with liberty to cut and carry them away at his pleasure, forever, the grantee acquires an estate in fee in the trees, with an interest in the soil sufficient for their growth, while the fee in the soil itself remains in the grantor.[6] And a like effect is produced in favor of the grantor by reserving the trees in granting the land, giving him a life estate or a fee, according to the terms of the reservation.[7]

rington *v.* Roots, 2 M. & W. 248; Walton *v.* Lowrey, 74 Miss. 484; s. c. 21 So. Rep. 243; Alt *v.* Grosclose, 61 Mo. App. 409; Hirth *v.* Graham, 50 Ohio St. 57; s. c. 33 N. E. Rep. 90; Buck *v.* Pickwell, 27 Vt. 157; Howe *v.* Batchelder, 49 N. H. 204; Daniels *v.* Bailey, 43 Wis. 566; Knox *v.* Horalson, 2 Tenn. Ch. 232; Carpenter *v.* Medford, 99 N. C. 495; s. c. 6 S. E. Rep. 785.

[1] Nettleton *v.* Sykes, 8 Met. 34; Bostwick *v.* Leach, 3 Day (Conn.), 476; Cutter *v.* Pope, 13 Me. 377; Cain *v.* McGuire, 13 B. Mon. 340; Smith *v.* Bryan, 5 Md. 141; Byassee *v.* Reese, 4 Met. (Ky.) 372; Leonard *v.* Medford, 85 Md. 666; s. c. 37 Atl. Rep. 365; Cool *v.* B. & L. Co., 87 Ind. 531.

[2] Spacy *v.* Evans, 152 Ind. 431; s. c. 52 N. E. Rep. 605.

[3] Wescott *v.* Delano, 20 Wis. 514; Gardiner Mg. Co. *v.* Heald, 5 Me. 381; Drake *v.* Wells, 11 Allen, 141.

[4] Kingsley *v.* Holbrook, 45 N. H. 313; Lansingburgh Bk. *v.* Crary, 1 Barb. 542; Warren *v.* Leland, 2 Barb. 613.

[5] See *ante*, § 6.

[6] Clap *v.* Draper, 4 Mass. 266; Knotts *v.* Hydrick, 12 Rich. 314. And for an application of the same doctrine to buildings, see *post*, § 20.

[7] Knotts *v.* Hydrick, *supra*; Rich *v.* Zeilsdorff, 22 Wis. 544; and such a reservation enures to the benefit of a prior parol vendee of the trees. Heflin *v.* Bingham, 56 Ala. 566.

But the grant of *the use* of the timber upon land is an incorporeal hereditament, and does not convey a title to the timber or to the soil.[1]

§ 18. **Constructive Annexation of Fixtures.** — On the other hand, things in themselves movable, and having the character of personalty, may acquire that of realty, by being fitted and applied to use as a part of the realty, though, at the time, temporarily disannexed therefrom; and they would pass accordingly with the land, upon a sale thereof, or go to an heir or devisee as realty.[2] Among these, for illustration, would be keys of locks upon doors, fire-frames, doors, window-blinds, mill-stones, and irons taken out of a mill for repair, bolts and other machinery of a flouring-mill,[3] and fragments of a house destroyed by a tempest.[4] So, upon the sale of a "saw-mill," with the land on which it stood, the iron bars and chains then in it, and used for operating it, passed as a part of the realty.[5] So by the civil codes of France and Louisiana, many things in their nature movable acquired the character and qualities of things immovable by reason of the uses for which they were destined and applied. Among these were animals employed in husbandry, farming utensils, plants, manure, doves in a pigeon-house, and all such movables as the owner has permanently attached to property that is itself immovable.[6] And, in Louisiana, slaves were considered as immovables, and they partook of the inheritable quality of real property in some other of the States.[7]

§ 19. **Constructive Annexation — Railroad Rolling-stock.** — [The question frequently arises in connection with railroad

[1] Clark *v.* Way, 11 Rich. 621.

[2] 1 Wms. Ex'rs, 613–615 ; Sweetzer *v.* Jones, 35 Vt. 317.

[3] Colegrave *v.* Dios Santos, 2 B. & C. 76 ; Walmsley *v.* Milne, 7 C. B. N. S. 115 ; Liford's Case, 11 Rep. 50 ; House *v.* House, 10 Paige, 158 ; McLaughlin *v.* Johnson, 46 Ill. 163.

[4] Rogers *v.* Gilinger, 30 Penn. St. 185. See Dedley *v.* Foote, 63 N. H. 57.

[5] Farrar *v.* Stackpole, 6 Me. 154.

[6] In England, it has been held that the owner of land has, *ratione soli*, a property in the wild game killed thereon, — a right which attaches *eo instanti* that the animal is killed and not until then, and without regard to who does the killing. Blades *v.* Higgs, 13 C. B. N. S. 844 ; Rigg *v.* Lonsdale, 1 Hurlst. & N. 923 ; Blades *v.* Higgs, 11 H. L. Cas. 621, 630, 641 ; Sutton *v.* Moody, 1 Ld. Raym. 250.

[7] Code Nap. art. 524 ; Louis. Cod. art. 459, 461 ; Chinn *v.* Respass, 1 Mon. 25.

rolling-stock. If such property be a real fixture it will pass under a mortgage of the road; otherwise if it is mere personalty. The matter is now governed by statute in many States. Aside from such acts, the decisions are in conflict.[1] By the weight of authority rolling-stock is personal property.[2] Hop-poles also are a part of the realty, though taken down for the purpose of gathering the hops, or piled in the yard; as well as rails of a Virginia fence, or the loose stones of which a wall is constructed.[3] But peat cut for fuel, lying on land, is personal estate.[4]

§ 20. **Buildings may be Realty although severed.** — As the ownership of land may be divided by horizontal as well as vertical planes, it is not sufficient to sever the ownership of the fixture from that of the soil to convert a real fixture into personal property. The test is found in the question, Has the owner of the fixture the right to leave it permanently on the land? If he has, the fixture still remains land. Therefore one man may have an inheritable estate in a building, although another own the land on which it stands. The same is true of a single story, or even a single room in a house,[5] although, if such house or chamber be destroyed, all interest

[1] The following cases hold rolling-stock to be real property: Farmers' L. & T. Co. *v.* St. J. R. Co., 3 Dill. 412; Morrill *v.* Noyes, 56 Me. 458; Titus *v.* Mabee, 25 Ill. 257; State *v.* N. C. Ry. Co., 18 Md. 193; Pennock *v.* Coe, 23 How. 117; Phillips *v.* Winslow, 18 B. Mon. 431; Palmer *v.* Forbes, 23 Ill. 301, in which the doctrine is extended to rails, ties, spikes, etc., brought upon the ground to be attached to the realty. See *post*, § 1086.

[2] Randall *v.* Elwell, 52 N. Y. 521; Hoyle *v.* Plattsburg R. R. Co., 54 N. Y. 314; Williamson *v.* N. J. S. R. Co., 29 N. J. Eq. 311; B. C. & M. R. Co. *v.* Gilmore, 37 N. H. 411; Coe *v.* Columbus R. Co., 10 Ohio St. 372; Dubuque *v.* Ill. Cent. R. Co., 39 Iowa, 56; C. & N. Ry. Co. *v.* Fort Howard, 21 Wis. 44; Green's Brice's Ultra Vires, 238; Rorer on Railroads, 10.

[3] Bishop *v.* Bishop, 11 N. Y. 123, case of hop-poles; Mott *v.* Palmer, 1 N. Y. 564, case of rails of fences; Goodrich *v.* Jones, 2 Hill, 142; Y. B. 14 Hen. VIII. 25, pl. 6, case of a millstone. See Broom's Maxims, 295 *et seq.*; Wing *v.* Gray, 36 Vt. 261, 269; Glidden *v.* Bennett, 43 N. H. 306; Ripley *v.* Paige, 12 Vt. 353.

[4] Gile *v.* Stevens, 13 Gray, 146.

[5] Doe *v.* Burt, 1 T. R. 701; Lowell M. H. *v.* Lowell, 1 Met. 538; Cheeseborough *v.* Green, 10 Conn. 318; Co. Lit. 48 *b*; Loring *v.* Bacon, 4 Mass. 576; 1 Prest. Est. 214; Humphries *v.* Brogden, 12 Q. B. 739, 747, 756; Rhodes *v.* McCormick, 4 Iowa, 368, 375; Otis *v.* Smith, 9 Pick. 293. And for an application of the same doctrine to growing trees, see *ante*, § 17.

of the owner thereof in the land on which it stood might thereby be lost.[1]

§ 21. **Mines — Quarries — Reciprocal Rights of Owners.** — [So, one man may own the soil, and another a mine or quarry beneath, each having a fee or lesser estate in his respective part.[2]] And an incident to the ownership of a mine, where another owns the surface, is the duty of keeping the entrance to it so guarded as not to endanger the safety of the animals lawfully upon the surface.[3] The question in such cases ordinarily is, whether the interest of the one claiming the minerals is that of a corporeal hereditament, or a mere easement in another's land. If the grant be of the minerals in a particular locality, it carries an estate in the minerals as a part of the realty.[4] From the nature of these inheritances, the laws of property in them must be so adapted as to give to each the enjoyment of what belongs to him. While, therefore, the mine-owner may not remove the necessary subterranean support of the surface, the surface-owner may not impose additional burdens by artificial structures erected thereon, to be supported by the mine-owner.[5]

§ 22. **Shares of Stock.** — [Land owned by a corporation is the real property of the corporation, the interest of the shareholders being ordinarily personal.[6] But in some few cases, shares in a corporation organized solely for the purpose of holding and using real property have been held real prop-

[1] Stockwell *v.* Hunter, 11 Met. 448; Shawmut Bk. *v.* Boston, 118 Mass. 125.

[2] Stoughton *v.* Leigh, 1 Taunt. 402; Harris *v.* Ryding, 5 M. & W. 60; Harker *v.* Birkbeck, 3 Burr. 1556; Green *v.* Putnam, 8 Cush. 21; Adam *v.* Briggs Iron Co., 7 Cush. 361.

[3] Williams *v.* Groucott, 4 Best & S. 149.

[4] United States *v.* Castillero, 2 Black, 168; Rutland Marble Co. *v.* Ripley, 10 Wall. 339; Grubb *v.* Grubb, 74 Pa. St. 25; Reynolds *v.* Cook, 83 Va. 817; s. c. 3 S. E. Rep. 710.

[5] Harris *v.* Ryding, 5 M. & W. 60; Wilkinson *v.* Proud, 11 M. & W. 33; Brown *v.* Robins, 4 Hurlst. & N. 186; Shep. Touch. 89; Curtis *v.* Daniel, 10 East, 273; Humphries *v.* Brogden, 12 Q. B. 739; Caldwell *v.* Fulton, 31 Penn. St. 475; Grubb *v.* Bayard, 2 Wall. Jr. 81; Zinc Co. *v.* Franklinite Co., 13 N. J. 322, 341, the case of a mine of two distinct minerals. Clement *v.* Youngman, 40 Penn. St. 341; Coleman *v.* Chadwick, 80 Penn. St. 81.

[6] Bradley *v.* Holdsworth, 3 M. & W. 422; Bligh *v.* Brent, 2 Yo. & C. 268; Ang. & Am. Corp. §§ 557, 655–658; Mohawk, etc. R. R. *v.* Clute, 4 Paige, 393; Toll Bridge *v.* Osborn, 35 Conn. 7; Allen *v.* Pegram, 16 Iowa, 163; Williams on Pers. Prop. 155; Jellenik *v.* Huron Copper Co., 82 Fed. Rep. 778.

erty.[1]] But these were clearly exceptions, under the construction of the statutes creating them, to the general rule applicable to shares in incorporated companies.[2]

§ 23. **Doctrine of Fixtures applied to Manure.** — Manure made upon a farm in the ordinary manner, from the consumption of its products, is regarded in this country as belonging to the realty, and would pass with the farm if sold, and may not be removed by a tenant in the absence of any special contract to the contrary;[3] especially if it be upon the farm where it was dropped.[4] But in New Jersey it is held to be personal property, and not to pass with the realty as an incident, or part of it.[5] The law of New Brunswick coincides with that of New Jersey. In North Carolina a tenant for years may claim the manure made by him upon a farm as personal property, and remove the same upon leaving the premises. But if he leave it upon them, he loses the right to remove it.[6] [The rule which regards manure as a real fixture is one of policy to promote the interests of agriculture. It has no application to manure made in livery stables, or otherwise than in the usual course of husbandry.[7] Nor, if piled, would it pass on a sale of a small

[1] Drybutter *v.* Bartholomew, 2 P. Wms. 127, where the object was to make a canal, erect waterworks, etc.; Welles *v.* Cowles, 2 Conn. 567, case of a turnpike corporation; Price *v.* Price, 6 Dana, 107; Copeland *v.* Copeland, 7 Bush, 349, in which dower was assigned in stock of the L. & N. R. Co. This caused the legislature of Kentucky to declare the stock of railroad companies to be personal property. 2 Stanton's Ky. Digest, § 1035. Tomlinson *v.* Tomlinson, 9 Beav. 459 (canal shares).

[2] An early statute of Massachusetts authorized owners of lands in common to act as a corporate proprietary in the management or disposal of the same, the interest of each proprietor retaining its character of realty. Prov. Law, 402; Codman *v.* Winslow, 10 Mass. 146; Mitchell *v.* Starbuck, id. 5.

[3] Daniels *v.* Pond, 21 Pick. 367; Lewis *v.* Lyman, 22 Pick. 437; Kittredge *v.* Woods, 3 N. H. 503; Lassell *v.* Reed, 6 Me. 222; Stone *v.* Proctor, 2 Chip. 108. Parsons *v.* Camp, 11 Conn. 525; Fay *v.* Muzzey, 13 Gray, 53; Wetherbee *v.* Ellison, 19 Vt. 379; Middlebrook *v.* Corwin, 15 Wend. 169; Goodrich *v.* Jones, 2 Hill, 142; Sawyer *v.* Twiss, 26 N. H. 345; Perry *v.* Carr, 44 N. H. 118; Wadley *v.* Janvrin, 41 N. H. 519; Chase *v.* Wingate, 68 Me. 204; Collier *v.* Jenks, 19 R. I. 137; s. c. 32 Atl. Rep. 208.

[4] Hill *v.* De Rochmont, 48 N. H. 87; French *v.* Freeman, 43 Vt. 93.

[5] Ruckman *v.* Outwater, 28 N. J. 581.

[6] Smithwick *v.* Ellison, 2 Ired. 326.

[7] Needham *v.* Allison, 24 N. H. 355; Proctor *v.* Gilson, 49 N. H. 62; Daniels

part of a farm, although it happened to be piled on that part.[1]]

So in Vermont and Massachusetts, a sale of manure by the owner of the farm passes a title to it as personal property, and a subsequent conveyance of the farm would not pass the manure upon it, or divest the title of the purchaser to the same.[2] The rule in England seems to be so far different in the case of a tenant for years, that the way-going tenant may claim compensation for the same by the custom of the country.[3]

§ 24. **Heirlooms — Name of Hotel.** — There is a class of chattels which in England are known as "heirlooms," which by custom descend to the heir with the real estate, and thereby are regarded as belonging to it. Among them are articles of household stuff, furniture, or implements.[4] But they do not seem to be recognized by the law of this country. A name attached to a hotel by a tenant is not such a fixture that the landlord, on his leaving it, has an exclusive right to use it as the designation of that hotel, although the name of a hotel may be a trademark in which the proprietor has a valuable interest.[5]

§ 25. **Fixtures — Intended Use controls.** — [As illustrative of how the same things may be fixtures or otherwise, depending upon circumstances: "The building of a division fence is a dedication of the materials to the realty," and neither of the adjacent owners may remove the structure.[6]] If one gets out fencing-stuff on his farm to be used elsewhere than upon the farm on which it is cut and is lying, and then sells the farm, it would not pass with the freehold. Whereas, if cut to be used upon the farm, it would pass with it.[7] The same

v. Pond, 21 Pick. 367 ; Lassell *v.* Reed, 6 Greenl. 222 ; Parsons *v.* Camp, 11 Conn. 525 ; Carey *v.* Bishop, 48 N. H. 146.

[1] Collier *v.* Jencks, 19 R. I. 137 ; s. c. 32 Atl. Rep. 208.

[2] Strong *v.* Doyle, 110 Mass. 92 ; French *v.* Freeman, 43 Vt. 93.

[3] Roberts *v.* Barker, 1 Cr. & M. 809.

[4] Termes de la Ley, "Heirlooms ;" Jacob's Law Dict., "Heirlooms ;" 2 Bl. Com. 227.

[5] Woodward *v.* Lazar, 21 Cal. 448.

[6] Stover *v.* Hunsicker, 47 Penn. St. 514.

[7] Jenkins *v.* McCurdy, 48 Wis. 628, where slabs, sawdust, and other refuse used for filling are held to be realty, but slabs for firewood personalty as between

would be true of timber, and of stone raised from a quarry, and severed from the freehold. But if there be nothing to indicate where the stone is to be used, and nothing is said by the grantor or grantee when the land is conveyed, the stone would pass with the land. It would be otherwise if the grantor should give notice of the purposes for which the stone has been quarried when he conveys the land. Thus, where a landowner quarried and raised a large stone designed for a tomb outside of his farm, and sold his land, giving the purchaser notice of the purposes of the same, it was held that it remained the personal property of the vendor, though he suffered it to remain where it was for thirty-two years, and he might maintain trover for a conversion thereof by the owner of the farm.[1]

§ 26. **Fixtures — The Persons interested.** — The persons between whom questions ordinarily arise in relation to these are: 1. Vendor and vendee, including mortgagor and mortgagee. 2. Heir and executor. 3. Landlord and tenant. 4. Executor of tenant for life, and reversioner or remainder-man.

§ 27. **Fixtures as between Vendor and Vendee.** — In respect to the first, little need be added to what has been said above. If the owner of lands provides anything of a permanent nature fitted for and actually applied to use upon the premises by annexing the same, it becomes a part of the realty, and passes to the purchaser, though it might be removed without injury to the premises.[2] This principle was applied to the case of window-blinds and double windows which the owner of a

vendor and vendee. So Conklin *v.* Parsons, 1 Chandl. 240, rails laid along the line of a fence, and intended to be used for the fence, are realty, as manifestly so appropriated.

[1] Noble *v.* Sylvester, 42 Vt. 146.

[2] Farrar *v.* Stackpole, 6 Me. 154, 157; Walker *v.* Sherman, 20 Wend. 636; Teaff *v.* Hewett, 1 Ohio St. 511; Buckley *v.* Buckley, 11 Barb. 43; 2 Smith L. C. 5th Am. ed. 252; Woodman *v.* Pease, 17 N. H. 282; Voorhees *v.* McGinnis, 48 N. Y. 278, 282; Arnold *v.* Crowder, 81 Ill. 56, citing the text; Green *v.* Phillips, 26 Gratt. 752; Shelton *v.* Ficklin, 32 Gratt. 727, 735. In Fratt *v.* Whittier, 58 Cal. 126, where vendor of a hotel retained the "furniture, pictures, and carpets, but none of the permanent fixtures," gas fixtures, kitchen range, boiler, and water-tank were held to pass to the vendee, mainly on the intent implied from the enumeration of what was retained. But that such fixtures are realty in favor of a vendee apart from any construction of the deed, see Erdman *v.* Moore, 58 N. J. L. 445; s. c. 33 Atl. Rep. 958.

house had procured for it, and had in it at the time he sold it. The blinds had never been attached to the building, but were sitting in the house at the time of the sale. The double windows would fit into the existing window-frames, and had been used one winter by merely setting them into the frames without being fastened in any way, and were not in sight when the sale was made. It was held that they had not been so far fitted and fastened to the house as to pass with it as fixtures.[1]

§ 28. **Fixtures as between Mortgagor and Mortgagee.** — The same rule applies between mortgagor and mortgagee, whether the article in question be annexed to the premises before or after making the mortgage.[2] And this doctrine was held to apply, although the mortgagor was one of a partnership who occupied the premises, and made the attachment of the fixture to the premises.[3] But even a mortgagor may make temporary erections if they are not attached to the freehold, and may remove them before the mortgage is foreclosed, if he does not depreciate the value of the security as it existed when the mortgage was given. In this case, a partnership placed upon the land of one of the partners a temporary building upon blocks, and in no otherwise annexed to the realty. It was held not to be bound by the mortgage, as it would have been if annexed to the soil.[4] In one case the court held a steam-engine,

[1] Peck *v.* Batchelder, 40 Vt. 233. See Spinney *v.* Barbe, 43 Ill. App. 585.

[2] Gardner *v.* Finley, 19 Barb. 317; Walmsley *v.* Milne, 7 C. B. N. S. 115; *post*, § 1085; Union Bank *v.* Emerson, 15 Mass. 159; Winslow *v.* Merch. Ins. Co., 4 Met. 306; Roberts *v.* Dauphin Bank, 19 Penn. St. 71; Robinson *v.* Preswick, 3 Edw. Ch. 246; Wadleigh *v.* Janvrin, 41 N. H. 514; Burnside *v.* Twitchell, 43 N. H. 390; Hoskin *v.* Woodward, 45 Penn. St. 42; Crane *v.* Brigham, 11 N. J. Eq. 29, limiting and defining the right; Richardson *v.* Copeland, 6 Gray, 536; Pierce *v.* George, 108 Mass. 78. In Ward *v.* Kilpatrick, 85 N. Y. 413, mirrors fastened into a wall and fitted with hat racks, whose removal would leave the wall unfinished, were held to go with the realty. See also D'Eyncourt *v.* Gregory, L. R. 3 Eq. 382; Erkstrom *v.* Hall, 90 Me. 186; s. c. 38 Atl. Rep. 106; Cook *v.* Condon, 6 Kan. App. 574; s. c. 51 Pac. Rep. 587; Wickes *v.* Hill, 115 Mich. 333; s. c. 73 N. W. Rep. 375; Shepard *v.* Blossom, 66 Minn. 421; s. c. 69 N. W. Rep. 221.

[3] Cullwick *v.* Swindell, L. R. 3 Eq. 249; *Ex parte* Cotton, 2 M. D. & De G. 725; Lynde *v.* Rowe, 12 Allen, 100; Kelly *v.* Austin, 46 Ill. 156. So in Thompson *v.* Vinton, 121 Mass. 139, the mortgagee's right was held superior to the claim of the mortgagee's partner, who paid in part for the fixtures and took a lease of them.

[4] Kelly *v.* Austin, 46 Ill. 156.

put into the mortgaged premises by the mortgagor, not to pass under the mortgage, from the nature of the property, it being a water-mill, and the engine being only placed there in a dry time to supply power.[1] So it is held that if the machinery, though adapted to the mill of the mortgagor, is merely so affixed as to be held steadily in place, and has nothing in its character special to the mortgagor's business, but could be equally well used in any manufacturing business, it is personalty.[2] [For questions arising between vendor of chattels and mortgagee of the realty, see *ante*, § 9.] If the fixtures are removed by their original vendor by consent of the mortgagee of the land, who subsequently assigns his mortgage, such assignment would not pass the fixtures.[3] So if the second mortgagee has a chattel mortgage only, he is estopped to deny the title of the vendor, who had the first chattel mortgage.[4]

§ 29. **Fixtures as between Heir and Executor.** — The same rule applies between the heir and executor of the owner of the freehold, unless regulated by statute, as is the case in New York.[5]

§ 30. **Fixtures as between Debtor and Creditor.** — The same rule applies between debtor and creditor, where the latter levies upon the land of the former for debt.[6]

§ 31. **Fixtures — Dower.** — The same rule applies between heir or vendee of husband and his widow in respect to the premises set out to her as dower.[7]

§ 32. **Examples of Real Fixtures.** — Among the articles to which this rule has been held to apply, in addition to those above enumerated, have been rolls in an iron-mill, though lying loose in the mill;[8] steam-engine and boiler; engines and frames designed and adapted to be moved and used by such engine;[9]

[1] Crane *v.* Brigham, 11 N. J. Eq. 30.

[2] Hubbell *v.* E. Cambr. Sav. Bk., 132 Mass. 447; Robertson *v.* Corsett, 39 Mich. 777; and see *post*, § 32.

[3] Voorhees *v.* McGinnis, 48 N. Y. 278; Bartholomew *v.* Hamilton, 105 Mass. 239.

[4] Smith *v.* Waggoner, 50 Wis. 155.

[5] 2 Kent Com. 8th ed. 345 and note; House *v.* House, 10 Paige Ch. 158; Fay *v.* Muzzey, 13 Gray, 53; Wms. Pers. Prop. 14.

[6] Farrar *v.* Chauffetete, 5 Denio, 527; Goddard *v.* Chase, 7 Mass. 432.

[7] Powell *v.* Monson Co., 3 Mason, 459.

[8] Voorhis *v.* Freeman, 2 Watts & S. 116; Hill *v.* Sewald, 53 Penn. St. 271.

[9] Sparks *v.* State Bank, 7 Blackf. 469; Winslow *v.* Merch. Ins. Co., 4 Met.

dye-kettle set in brick ;[1] the main mill-wheel and gearing of a factory necessary to operate it ;[2] a cotton-gin or sugar-mill fixed in its place.[3] A trip-hammer attached to a block set in the ground, the blower of a forge, a force-pump and pipes for raising water, and shafting annexed to the freehold and adapted to be used with it, are fixtures. So a windlass attached to a butcher shop is a fixture.[4] Also a bell hung in the cupola of a barn so as to be rung for farm purposes; and a church bell while hung in a temporary frame, pending the rebuilding of the belfry, are fixtures, and will pass as such with the realty.[5] So, where one having a mill and steam-engine, with works to be carried by it, procured and placed in it a portable grist-mill, which he fixed firmly and securely in it, but it could be taken out without injury, it was held that it passed as a part of the realty upon a sale of the latter, as it had been annexed with an intention of its being a permanency in carrying on the business of the mill.[6]

§ 33. **Examples of Things which are not Fixtures.** — On the other hand, machines and the like, which may be used in any other building as well as that in which they are placed, such as carding-machines in a factory, are ordinarily deemed to be personal chattels, though fastened securely to the freehold, if the same can be removed without material

306 ; Sands *v.* Pfeiffer, 10 Cal. 258 ; Walmsley *v.* Milne, 7 C. B. N. S. 115 ; Voorhees *v.* McGinnis, 48 N. Y. 278, 285 ; Pierce *v.* George, 108 Mass. 78, 82 ; McConnell *v.* Blood, 123 Mass. 47 ; Kelly *v.* City Mills, 126 Mass. 148 ; Green *v.* Phillips, 26 Gratt. 752 ; Oves *v.* Ogelsby, 7 Watts, 106 ; Hobson *v.* Gorringe, 1 L. R. Ch. Div. (1897) 182.

[1] Noble *v.* Bosworth, 19 Pick. 314 ; Union Bank *v.* Emerson, 15 Mass. 159 ; Despatch Line *v.* Bellamy, 12 N. H. 205. So potash kettles. Miller *v.* Plumb, 6 Cow. 665.

[2] Powell *v.* Monson Co., 3 Mason, 459 ; Buckley *v.* Buckley, 11 Barb. 43.

[3] Bratton *v.* Clawson, 2 Strobh. 478; Richardson *v.* Borden, 42 Miss. 71; Fairis *v.* Walker, 1 Bailey, 540 ; Hutchins *v.* Masterson, 46 Tex. 551.

[4] McLaughlin *v.* Nash, 14 Allen, 136 ; Capen *v.* Peckham, 35 Conn. 88, 93.

[5] Weston *v.* Weston, 102 Mass. 514, 519 ; Alvord Co. *v.* Gleason, 36 Conn. 86 ; Dubuque Soc. *v.* Fleming, 11 Iowa, 533.

[6] Potter *v.* Cromwell, 40 N. Y. 287–296 ; Stillman *v.* Flenniken, 58 Iowa, 450 ; Green *v.* Chicago, etc. R. Co., 8 Kan. App. 611 ; s. c. 56 Pac. Rep. 136, where a lathe, so heavy as to require no fastening to hold it in place, connected only by belt to shaft, but essentially a part of the manufacturing plant as originally designed, was held realty.

injury to the freehold.[1] [So appliances used in a manufacturing concern, which are to be considered as accessories of the business rather than of the building, such as pumps, fermenting-tubs, and steam-kettles in a brewery.[2]] So marble slabs laid upon brackets in a house, and mirrors hooked, but not otherwise fastened, to the wall, are not fixtures, but furniture, and do not pass from vendor to vendee of the realty.[3] So a steam engine and boiler set upon frames and portable, a planing-machine and anvils resting on the ground but not fastened, forge tools and a vice annexed by screws to a bench in the shop, and a grindstone in a movable frame, are chattels and not fixtures.[4] And it is stated as a rule of law, in respect to mills and manufactories, that in the absence of agreement or custom, anything that can be removed without essential injury to itself or the freehold is a chattel between a purchaser of the realty and a mortgagee of the personalty.[5]

§ 34. **Character of Fixtures governed by Intention.** — Whether a thing which may be a fixture becomes a part of the realty by annexing it, depends, as a general proposition, upon the intention with which it is annexed.[6] Between vendor and vendee, or mortgagor and mortgagee, it has been held that gas-fixtures, including a gasometer and apparatus for generating gas, would pass with the house in which they were in use, but not between tenant and landlord if put in by the tenant.[7] But it seems now settled that gas-fixtures other than gas-piping within the walls are chattels only;[8] though

[1] Cresson *v.* Stout, 17 Johns. 116; Gale *v.* Ward, 14 Mass. 352; Swift *v.* Thompson, 9 Conn. 63; Vanderpoel *v.* Van Allen, 10 Barb. 157.

[2] Schneider *v.* Schneider, 7 Ohio Dec. 106.

[3] Weston *v.* Weston, 102 Mass. 514; McKeage *v.* Han. F. I. Co., 81 N. Y. 38.

[4] Hubbell *v.* E. Cambr. Sav. Bk., 132 Mass. 447; but Christian *v.* Dripps, 28 Penn. St. 271, *contra*.

[5] Wade *v.* Johnson, 25 Ga. 331. See more fully on this subject, Walker *v.* Sherman, 20 Wend. 636–657; Walmsley *v.* Milne, *supra*.

[6] Hill *v.* Sewald, 53 Penn. St. 271; Hill *v.* Wentworth, 28 Vt. 428, 436; Voorhees *v.* McGinnis, 48 N. Y. 278, 283; Hutchins *v.* Masterson, 46 Tex. 551.

[7] Hays *v.* Doane, 11 N. J. 96; Keeler *v.* Keeler, 31 N. J. Eq. 191; Wall *v.* Hinds, 4 Gray, 256; Sewell *v.* Angerstein, 18 L. T. N. S. 300.

[8] Guthrie *v.* Jones, 108 Mass. 191; Towne *v.* Fiske, 127 Mass. 125; McKeage *v.* Han. F. I. Co., 81 N. Y. 38; Jarecki *v.* Philh. Soc., 79 Penn. St. 403; Heysham

this may be controlled by the agreement of the parties.[1] [But according to the decision in a late case (1897), it is necessary to distinguish between such attachments made to a system of pipes not originating in the house, and those which are made to pipes deriving their supply from generating apparatus on the premises.[2]] Steam boilers and engines used in a marble-mill, and supplying the power by which it is carried on, pass as a part of the realty by a mortgage of the estate by the owner. But the saw-frames in such mill were held to be personal chattels.[3] So platform scales on a hay and grain farm are fixtures.[4] If a steam-engine, for instance, be placed in a shop or factory to create the moving power by which it is carried on, the engine and shafting necessary to communicate the motive power to the machinery would be as much a part of the realty as a water-wheel, and would pass with the realty by deed or mortgage.[5] The shelves, drawers, and counter-tables fitted in a store pass with the store as realty.[6] An ice-chest used in a tavern is not a fixture, although so large in its dimensions as to render it necessary to take it in pieces to remove it from the house. It would be of the nature of a bedstead or bookcase in that respect.[7] But a stone sink, set in a frame and used for domestic purposes, and placed there by the owner of the premises, is a part of the realty and goes to the heir. But if it is put in by a tenant, it would belong to him, and might be removed by him during the term.[8] A portable furnace for warming a house, together with the stove-pipe belonging to the same,

v. Dettre, 89 Penn. St. 506; Smith *v.* Commonwealth, 14 Bush, 31; Rogers *v.* Crow, 40 Miss. 91; National Bank of Catasauqua *v.* North, 160 Penn. St. 303; s. c. 28 Atl. Rep. 694; Capehart *v.* Foster, 61 Minn. 132; s. c. 63 N. W. Rep. 257.

[1] Funk *v.* Brigaldi, 4 Daly, 359; Fratt *v.* Whittier, 58 Cal. 126.

[2] St. Louis Radiator Mfg. Co. *v.* Carroll, 72 Mo. App. 315, distinguishing National Bank of Catasauqua *v.* North, 160 Penn. St. 303; s. c. 28 Atl. Rep. 694; but see Capehart *v.* Foster, 61 Minn. 132; s. c. 63 N. W. Rep. 257.

[3] Sweetzer *v.* Jones, 35 Vt. 317; Fullam *v.* Stearns, 30 Vt. 443.

[4] Arnold *v.* Crowder, 81 Ill. 56.

[5] Hill *v.* Wentworth, 28 Vt. 428; Harris *v.* Haynes, 34 Vt. 220; Sweetzer *v.* Jones, *supra;* Richardson *v.* Copeland, 6 Gray, 536; Climie *v.* Wood, L. R. 3 Exch. 257.

[6] Tabor *v.* Robinson, 36 Barb. 483.

[7] Park *v.* Baker, 7 Allen, 78.

[8] Bainway *v.* Cobb, 99 Mass. 457.

was in one case held to be a fixture because set in the cellar in a pit dug for it.[1] But in another case a like preparation for the position of such a furnace was held not to be decisive;[2] and undoubtedly the increasing tendency of the law is to hold all household conveniences to be chattels.[3] Things which may be fixtures often become so, or otherwise, from the circumstance that they have been actually fitted for and applied to the realty. Thus, a stone procured by the owner of a house for a doorstep, and brought upon the premises, but never actually applied to use, was held to be a chattel not passing with the realty.[4] So rolls procured and intended for an iron-mill, and brought to it, do not become a part of the realty until fitted and actually applied to use.[5] Portions of a cider-mill, which was in process of repair, had been detached from it at the time the land upon which it stood was conveyed by the owner. Some of these were laid up for safety; while others, such as the stanchions and tie-chains for the cattle, and the door hinges, were lying loose upon the premises. It was held that, notwithstanding their separation, these articles all passed by the conveyance as parts of the realty.[6] So the saws, crank, and mill gear of a saw-mill form a part of the freehold and inheritance.[7]

§ 35. **Removal of Fixtures by Tenant.** — The rule of law as to removing fixtures is most liberal when applied between tenant and landlord.[8] And, as a general proposition, whatever a tenant affixes to leased premises may be removed by him during the term, provided the same can be done without a material injury to the freehold. Nor will a conveyance of

[1] Stockwell *v.* Campbell, 39 Conn. 362.

[2] Rahway Sav. Inst. *v.* Bapt. Ch., 36 N. J. Eq. 61; and se Towne *v.* Fiske, 127 Mass. 123.

[3] *Ex parte* Sheen, 43 L. T. N. S. 638; see Kerby *v.* Clapp, 15 App. Div. (N. Y.) 37, where ranges and heaters connected by the ordinary attachments of pipes but easily detachable are not fixtures but household goods. S. C. 44 N. Y. Supp. 116.

[4] Woodman *v.* Pease, 17 N. H. 282.

[5] Johnson *v.* Mehaffey, 43 Penn. St. 308; *In re* Richards, L. R. 4 Ch. App. 630. See 18 Am. L. Reg. 143–146.

[6] Wadleigh *v.* Janvrin, 41 N. H. 503. So Patton *v.* Moore, 16 W. Va. 428; and see Dubuque Soc'y *v.* Fleming, 11 Iowa, 533.

[7] Lint *v.* Wilson, 1 Kerr (N. B.) 223.

[8] Elwes *v.* Maw, 3 East, 38; Van Ness *v.* Packard, 2 Pet. 137; 2 Smith L. C. 5th Am. ed. 240; Crane *v.* Brigham, 11 N. J. Eq. 30.

the premises by the landlord interfere with the rights of the tenant in respect to such fixtures,[1] [for the tenant's possession is notice to the purchaser of his rights. But if the removal of what the tenant has annexed would occasion material injury to the freehold, it becomes a part of the realty and is irremovable.[2]]

§ 36. **English Courts discriminate.** — And although some of the English cases discriminate in this respect between structures for the purposes of trade and manufacture and those of agriculture, the American courts do not recognize the distinction as applicable here.[3] A barn, however, standing upon stone piers upon the ground, was held to form a part of the realty.[4]

§ 37. **Examples of Trade Fixtures.** — Among what are considered as trade fixtures are, vats and coppers of a soap-boiler,[5] green and hot houses of nurserymen or gardeners,[6] fire-engines set up to work a colliery, and salt-kettles in salt-works.[7] In the case of a lease of an oyster saloon, it was held that a glass case, a case of drawers, a mirror, and gas-fixtures fastened to the wall by the tenant, were furniture rather than fixtures, and if the landlord closed the saloon and refused to let the tenant remove them, he was liable in

[1] Raymond *v.* White, 7 Cow. 319 ; Davis *v.* Buffum, 51 Me. 162, 163 ; Fuller *v.* Tabor, 39 Me. 519 ; Hewitt *v.* Watertown Steam Engine Co., 65 Ill. App. 153.

[2] Pond *v.* O'Conner, 70 Minn. 266 ; s. c. 73 N. W. Rep. 159 ; Fortescue *v.* Bowler, 55 N. J. Eq. 741 ; Chase *v.* N. Y. Insulated Wire Co., 57 Ill. App. 205. See Ewell on Fixt. 99 ; Taylor on Landlord and Tenant, § 547, 8th ed.

[3] 2 Smith L. C. 5th Am ed. 240 ; Van Ness *v.* Pacard, *supra ;* Holmes *v.* Tremper, 20 Johns. 29 ; Whiting *v.* Brastow, 4 Pick. 310 ; Wing *v.* Gray, 36 Vt. 261, a case of hop-poles.

[4] Landon *v.* Pratt, 34 Conn. 517.

[5] Poole's Case, 1 Salk. 368 and note.

[6] Penton *v.* Robart, 2 East, 88.

[7] Lawton *v.* Lawton, 3 Atk. 13 ; Ford *v.* Cobb, 20 N. Y. 344. In the case of Van Ness *v.* Pacard, *ubi supra*, a tenant erected on the leased premises a wooden dwelling-house, two stories high, with a shed of one story, having a cellar of stone or brick foundation, and a brick chimney for his business as a dairyman, and the residence of his family and servants employed by him, and it was held he might remove it. In Iowa the court divided upon the question whether a store erected by a lessee under a parol agreement by the lessor, who was mortgagor of the premises, was a trade fixture. Cowden *v.* St. John, 16 Iowa, 590. The doctrine of the text was applied to an engine-house erected upon a stone foundation, in White's Appeal, 10 Penn. St. 252. See also Hill *v.* Sewald, 53 Penn. St. 271.

trover for their conversion. But it would be otherwise with a long counter secured to the floor. This would be a fixture which the tenant may remove during the term, but not afterwards.[1] A boiler and steam-engine, placed by a tenant in leased premises, were held to be fixtures, but liable to be removed by him or to be attached as the personal property of the tenant.[2]

§ 38. **Tenant for Years may lose Right to remove.** — But if the tenant for a fixed term suffer the chattel fixture erected by him to remain annexed to the premises after the expiration of his term, or rather of his authorized holding, it becomes at once a part of the realty, and he may not afterwards sever it;[3] and a subsequent severance by the landlord will not revest the title in the tenant.[4] And this rule applies in the case of nursery trees planted by the tenant.[5] So where the tenant erected a building upon the premises, which was fastened by iron bolts to rocks in the ground, and had a machine weighing six tons placed upon a stone and mortar foundation in the cellar, and extending up into the second

[1] Guthrie *v.* Jones, 108 Mass. 191; Asheville Woodworking Co. *v.* Southwick, 119 N. C. 611; s. c. 26 S. E. Rep. 253.

[2] Hey *v.* Bruner, 61 Penn. St. 87.

[3] White *v.* Arndt, 1 Whart. 91; Gaffield *v.* Hapgood, 17 Pick. 192; Lyde *v.* Russell, 1 B. & Ad. 394; Lee *v.* Risdon, 7 Taunt. 188; 2 Smith L. C. 5th Am. ed. 240; Bliss *v.* Whitney, 9 Allen, 114; Ewell Fixt. 138; Davis *v.* Moss, 38 Penn. St. 346, 353; nor is the fixture then liable to attachment by tenant's creditor's, Morey *v.* Hoyt, 62 Conn. 542; s. c. 26 Atl. Rep. 127; *post*, § 287; and Penton *v.* Robart, 2 East, 88; Preston *v.* Briggs, 16 Vt. 129, so far as they support a right to a reasonable time after the term ends, are not law. The case of Burke *v.* Hollis, 98 Mass. 55, sometimes cited to the same effect, proceeded on the special agreement of the parties. See *post*, § 39. The earlier rule was stated to be that the tenant must remove his fixtures before the term ended; but the modern rule is that given in Weeton *v.* Woodcock, 7 M. & W. 14, 19, "that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself tenant." Heap *v.* Barton, 12 C. B. 274; Rolfey *v.* Henderson, 17 Q. B. 574; Mackintosh *v.* Trotter, 3 M. & W. 184, per Parke, B.; *Re* Stevens, 2 Lowell, 496, 500; Dubois *v.* Kelly, 10 Barb. 496; Mason *v.* Fenn, 13 Ill. 525; Overton *v.* Williston, 31 Penn. St. 155; Cromie *v.* Hoover, 40 Ind. 49; Davis *v.* Moss, 38 Penn. St. 346, 353; Lewis *v.* O. N. & P. Co., 125 N. Y. 341; s. c. 26 N. E. Rep. 301; Brown *v.* R. E. L. & P. Co., 55 Fed. Rep. 229.

[4] Stokoe *v.* Upton, 40 Mich. 581.

[5] Brooks *v.* Galster, 51 Barb. 196.

story, it was held that by abandoning the premises the tenant ceased to have a right to remove these as fixtures.[1] And where a lessee for years erected buildings upon the premises, and at the expiration of his term took a new lease of the premises for years, but nothing was said of the buildings, it was held to be an abandonment of his right to remove them, and that they became a part of the freehold, inasmuch as the new lease carried the buildings and fixtures, and the lessee, accepting the lease, was estopped to claim them as his own.[2] Nor will equity interpose in favor of a tenant, on the ground that he has made expensive improvements on the estate, and secure to him the right to enjoy them after the expiration of the term.[3] But where the tenant was prevented from removing buildings from the premises by injunction from the court, he was held entitled to a reasonable time in which to remove them, after the injunction was dissolved.[4] [It is necessary, however, to distinguish between mere portable utensils, *e. g.*, a cider-mill, which preserve both their character and ownership, although allowed to remain on the premises after the expiration of the term, and chattel fixtures, which, by reason of their annexation, may lose both their ownership and their character as personalty.[5]]

§ 39. **Right of Removal when Landlord terminates Tenancy.** — Where, however, the termination of the tenant's lawful possession occurs by the act of the landlord, as by entry for forfeiture, more difficulty arises in determining the true rule. It has been said that the right of the tenant to remove fixtures after the termination of his lawful possession is alike gone, whether it determines by effluxion of time or by re-entry for

[1] Talbot *v.* Whipple, 14 Allen, 177.

[2] Loughran *v.* Ross, 45 N. Y. 792; Watriss *v.* First Nat. Bk., 124 Mass. 571; McIver *v.* Estabrook, 134 Mass. 550; Merritt *v.* Judd, 14 Cal. 59; Williams *v.* Lane, 62 Mo. App. 66; Jungerman *v.* Bovee, 19 Cal. 355; Hedderich *v.* Smith, 103 Ind. 203; s. c. 2 N. E. Rep. 315; Marks *v.* Ryan, 63 Cal. 107. But see Kerr *v.* Kingsbury, 39 Miss. 150, *contra*.

[3] Corning *v.* Troy Iron Co., 40 N. Y. 219.

[4] Goodman *v.* Han. & St. J. R. R., 45 Mo. 33; Mason *v.* Fenn, 13 Ill. 525; Bircher *v.* Parker, 40 Mo. 118; *Re* Stevens, 2 Lowell, 496. So where he is delayed beyond his term by negotiations with the landlord. Hallen *v.* Runder, 1 C. M. & R. 266; Sumner *v.* Bromilow, 34 L. J. Q. B. 130.

[5] Holmes *v.* Tremper, 20 Johns. 29.

forfeiture.[1] Thus where a tenant held over after the expiration of his term, and became at sufferance, it was held that he could not remove fixtures after his landlord had actually entered for the purpose of determining the tenancy.[2] But that the tenant's right to remove is *eo instanti* determined by the landlord's re-entry for any forfeiture during the term can hardly be considered as settled.[3] If, however, the period of the tenant's holding is uncertain, he has a reasonable time after it comes to an end in which to remove his fixtures. Thus where a lessee of premises for an indefinite period erected an ice-house thereon, and the lessor determined the lease when the tenant had a large quantity of ice in the house, and the tenant sold this as soon and as fast as he could, taking nearly two months, and then removed the house which was set upon blocks, it was held to be within a reasonable time, and that he had a right to remove it.[4] And in a later case it was held that it did not lie in the power of a tenant, after having annexed fixtures to the premises and then mortgaging them, to defeat the title of his mortgagee by surrendering possession of the premises to his lessor, and

[1] Pugh *v.* Arton, L. R. 8 Eq. 626; Whipley *v.* Dewey, 8 Cal. 36; Morey *v.* Hoyt, 62 Conn. 542; s. c. 26 Atl. Rep. 127.

[2] Leader *v.* Homewood, 5 C. B. N. s. 546; Weeton *v.* Woodcock, 7 M. & W. 14; Haflick *v.* Stober, 11 Ohio St. 482; 4 C. B. N. s. 135, Am. ed. note. But see Lewis *v.* O. N. &P. Co., 125 N. Y. 341, holding that a tenant at sufferance retains his right to the fixtures even upon eviction. s. c. 26 N. E. Rep. 301.

[3] In all the cases prior to Pugh *v.* Arton, *supra*, where this effect is given to the landlord's re-entry, the tenant's term had already expired by efflluxion of time. See cases in preceding notes; also, Lyde *v.* Russell, 1 B. & Ad. 394; Davis *v.* Eyton, 7 Bing. 154; Whipley *v.* Dewey, 8 Cal. 36; or it was terminated by a judgment in ejection, Minshall *v.* Lloyd, 2 M. & W. 450; Mackintosh *v.* Trotter, 3 M. & W. 184; and see Keogh *v.* Daniell, 12 Wis. 163, which presumed notice That the same result would occur from the expiration of a notice to quit, seems clear, notwithstanding the doubts expressed *obiter* in *Re* Stevens, 2 Lowell, 496. In Pugh *v.* Arton, *supra*, though the term had not run out, yet the breach was that the lessee conveyed a second time his term in trust for creditors; and on the first such conveyance, two years before, a yearly tenancy had been substituted for the term; so that there the tenant had notice that he might forfeit his right to remove, but took the risk. But this hardly sustains the position that by a re-entry for any breach, whatever the act conditioned for, the tenant may be divested of his fixtures without prior notice, and immediately on the landlord's entry.

[4] Antoni *v.* Belknap, 102 Mass. 193; N. Cent. R. R. *v.* Canton Co., 30 Md. 347; Cooper *v.* Johnson, 143 Mass. 108; s. c. 9 N. E. Rep. 33; Sullivan *v.* Carberry, 67 Me. 531.

his mortgagee, after such surrender, might enter and remove them.[1] So where his agreement with the lessor gives him the right to remove fixtures "at the expiration of his holding;" this implies within a reasonable time after, as the express provision is construed to intend more than the law would imply from the mere fact of a tenancy.[2] [If the tenant has been wrongfully restrained from removing his chattel fixtures he will be allowed a reasonable time after dissolution of the injunction.[3]

§ 40. **Tenant for Uncertain Term losing Right of Removal.** — If the tenant for an uncertain term himself terminate the tenancy before removing his fixtures, he loses the right. Thus, the right was lost by a tenant at will who assigned to another.[4]]

§ 41. **Fixtures for Ornament and Convenience.** — What has been said as to trade fixtures, etc., applies also to those for ornament and convenience, such as marble chimney-pieces, grates, stoves, bells and their hangings, and the like.[5]

§ 42. **Effect of Removal by Owner.** — If fixtures are removed from the freehold to which they have been annexed by their owner, they at once resume their character of simple chattels.[6]

§ 43. **Chattel Interests in Land.** — There are interests in lands which, from their not being inheritable, are regarded as chattels, though in their nature partaking of the character of the realty, from the property itself being fixed and immovable, such as estates for years, which go to executors or administrators upon the death of the tenant, rather than his heirs. Nor is their character affected by the number of years

[1] Lond. Loan Co. *v.* Drake, 6 C. B. N. S. 798, and note to S. C. Am. ed. p. 811; Co. Lit. 338 *b*.

[2] Stansfeld *v.* Portsmouth, 4 C. B. N. S. 120 ; and Burk *v.* Hollis, 98 Mass. 55, really proceeds on this ground.

[3] Mason *v.* Fenn, 13 Ill. 525 ; Bircher *v.* Parker, 40 Mo. 118.

[4] Dingley *v.* Buffum, 57 Me. 351.

[5] 3 Atk. 15 ; Grymes *v.* Boweren, 6 Bing. 437 ; 2 Smith L. C. 5th Am. ed. 241 ; Mott *v.* Palmer, 1 N. Y. 570 ; Lawton *v.* Salmon, 1 H. Black. 260, note; Norton *v.* Dashwood, 2 L. R. Ch. Div. (1891) 497.

[6] Heaton *v.* Findley, 12 Penn. St. 304. What has been said above of fixtures is rather by way of example than as a summary of the law on the subject.

by which their duration is measured, except in those States where inheritability is attached by statute to long terms.

§ 44. **Church Pews.** — Pews in churches are, in some States, declared by statute to be real, in others personal, estate. In the absence of such statute they partake of the nature of realty, although the ownership is that of an exclusive easement for special purposes, since the general property in the house usually belongs to the parish or corporation that erected it.[1] [The destruction of the building will terminate the easement. But if the building is destroyed or its use is discontinued as a matter of expediency, the pew-owner will be entitled to compensation.[2]] Of the same character is the right of burial in a public burying-ground. It is not a property in the soil, nor a right to compensation for the same, if, upon the ground having ceased to be used for burial purposes, the friends of the persons buried therein are required to remove the remains.[3]

§ 45. **Money as Realty — Conversion.** — In equity, money has sometimes the incidents and attributes of real estate. In one case, there was a devise that the land of a testator should be sold and the money paid over to an alien, and effect was given to the devise, although an alien could not take real estate. In another, money, directed to be laid out in land, was treated as land, and land directed to be sold, as money; and in another, curtesy was allowed to a husband out of money, the proceeds of his wife's land which had been sold.[4]

[1] Daniel *v.* Wood, 1 Pick. 102; Ithaca Ch. *v.* Bigelow, 16 Wend. 28; Gay *v.* Baker, 17 Mass. 435; Jackson *v.* Rounesville, 5 Met. 127; Church *v.* Wells, 24 Penn. St. 249.

[2] Freligh *v.* Platt, 5 Cow. 494; Voorhees *v.* Presbyterian Church, 17 Barb. 103; Aylward *v.* O'Brien, 160 Mass. 118; s. c. 35 N. E. Rep. 313.

[3] Kincaid's Appeal, 66 Penn. St. 411; Windt *v.* Germ. Ref. Ch., 4 Sandf. Ch. 471; Sohier *v.* Trinity Ch., 109 Mass. 21. But there is sufficient legal possession to maintain trespass *quare clausum* against a tort-feasor. Meagher *v.* Driscoll, 99 Mass. 281; Hollman *v.* Platteville, 101 Wis. 94; s. c. 76 N. W. Rep. 1119; Bessemer L. & I. Co. *v.* Jenkins, 111 Ala. 135; s. c. 18 So. Rep. 565.

[4] Craig *v.* Leslie, 3 Wheat. 577; Fletcher *v.* Ashburner, 1 Bro. C. C. 497; Foreman *v.* Foreman, 7 Barb. 215; March *v.* Berrier, 6 Ired. Eq. 524; Houghton *v.* Hapgood, 13 Pick. 154. So where, on a mortgage with power of sale, property was sold, after the mortgagor's death, for more than the debt, the surplus was held to be realty, and to go to the mortgagor's heirs. Dunning *v.* Ocean Bank, 61 N. Y. 497.

Equity treats that as done which is agreed to be done. So that money which, according to a will or agreement, is to be invested in land, is regarded in equity as real estate, and land which is to be converted into money is to be regarded as money accordingly.[1] And in Massachusetts the courts treat a sum of money as real estate under the following circumstances, viz.: One having mortgaged an estate, an action was commenced against him by a third party to recover the seisin of the land. The demandant recovered judgment, but was required to pay a certain sum of money into court for betterments made upon the estate by the tenant. It was held that the mortgagee was entitled to this money, under his mortgage of the real estate.[2]

§ 46. **Lands, Tenements, and Hereditaments.** — Real property includes lands, tenements, and hereditaments; the first implying something that is of a permanent, substantial nature, such as the soil itself, houses, trees, and the like; the second, tenements, including anything of which tenure or a holding may be predicated, if of a permanent nature, including, under the English law, many things besides lands, such as franchises, rights of common, rents, and the like; the third, hereditaments, being of a broader signification, and including anything which may by law be inherited.[3] Under the latter were embraced, among other things, "heirlooms," which are mentioned above.[4]

§ 47. **Hereditaments, corporeal and incorporeal.** — This broader term, hereditaments, is itself divided into two classes, namely, corporeal and incorporeal. The former include, as the term implies, what is of a substantial, tangible nature.[5] The latter is defined to be "a right issuing out of a thing corporate (whether real or personal), or concerning or annexed to or exercisable within the same."[6] Thus, one may

[1] Seymour *v.* Freer, 8 Wall. 202, 214.

[2] Stark *v.* Coffin, 105 Mass. 332; Whitcomb *v.* Taylor, 122 Mass. 243. See Rogers *v.* Rogers, 101 Tenn. 428; s. c. 47 S. W. Rep. 701.

[3] 2 Bl. Com. 16; Co. Lit. 20; 1 Prest. Est. 12, 13.

[4] Ibid.

[5] 2 Bl. Com. 17.

[6] 2 Bl. Com. 20; Co. Lit. 20; Hays *v.* Richardson, 1 Gill & J. 378; Washb. Easements, 10.

grant the future accretions or increments of what he owns at the time he makes such grant, as a tenant may the crops which will be growing at the end of his term, or the fruits to be grown upon land which he owns, and may mortgage the same.[1]

§ 48. **Livery of Seisin.** — The early mode of transferring lands from one to another was by putting the purchaser in actual possession by entering upon the land, or some equivalent act, which was called livery of seisin, — no deed being necessary, in such case, to pass the title to the purchaser.[2] But as a sale or conveyance of an incorporeal thing could not be accompanied by any such overact, it was effected by means of a deed from the vendor to the purchaser, evidencing the fact of his having granted the same. This was called a grant, as distinguished from livery of seisin. Consequently, corporeal hereditaments are said to "lie in livery;" incorporeal, "in grant."[3]

§ 49. **Feoffment — Grant.** — At the common law the conveyance of a corporeal hereditament was technically a *feoffment*, that of an incorporeal one a *grant*.[4] But this distinction in England and Virginia is practically abolished by statutory enactments, whereby all corporeal hereditaments, so far as regards the conveyance of the immediate freehold thereof, are deemed to lie in grant as well as in livery.[5]

§ 50. **Hereditaments which lie in Grant.** — Among the classes of property which come under the head of incorporeal hereditaments, and at common law lay in grant, may be mentioned remainders and reversions dependent upon an intermediate freehold estate,[6] which will be treated hereafter; and easements, such as a right of way, or passage of water through another's land,[7] or of light, and the like.[8]

§ 51. **Vested, Contingent, and Executory Estates.** — If the

[1] P. W. & B. R. R. *v.* Woelper, 64 Penn. St. 371; Grantham *v.* Hawley, Hob. 132.

[2] Deeds, as a mode of conveying corporeal hereditaments, were first required by the statute of frauds, in the time of Charles II. 1 Atk. Conv. 399.

[3] 1 Prest. Est. 13, 14; Wms. Real Prop. 195.

[4] 1 Law Mag. 279.

[5] Wms. Real Prop. 146; 8 & 9 Vict. c. 106, § 2; Code of Va. (1887) § 2417.

[6] 1 Law Mag. 274, 275; Doe *v.* Were, 7 B. & C. 243; Wms. Real Prop. 197.

[7] 1 Law Mag. 276, 277; Hewlins *v.* Shippam, 5 B. & C. 221.

[8] Cross *v.* Lewis, 2 B. & C. 686.

nature of the interest, ownership, or estate which may be had in real property, as above described, is considered, it will be found that it is divided into vested and contingent, executed and executory, according as it is absolute or uncertain, or the subject of present or future possession and enjoyment. An estate is *vested* when there is an immediate, fixed *right* of present or future enjoyment. An estate is *contingent* when the right to its enjoyment is to accrue on an event which is dubious and uncertain.[1] *Executed*, applied to estates, seems to be used as substantially synonymous with *vested*, while *executory*, though it relates to the future enjoyment of the property, is not necessarily contingent. A contingent interest, as above defined, would be executory. So might a vested one be, and would be, if future in its enjoyment, so far as relates to the possession.[2] An executory interest may be taken to intend a future estate which is in its nature indestructible, like the future interest in an executory devise of lands under a last will.[3]

§ 52. **Legal and Equitable Estates.** — There is also another classification of estates into legal and equitable, the former originating in and being governed by the common law; the latter being created and governed by a system of rules devised and adopted by courts of chancery, which will be hereafter explained.

[1] Fearne, Cont. Rem. 2; 1 Prest. Est. 65; ib. 61.

[2] 2 Bl. Com. 163; 1 Prest. Est. 88; ib. 62–64; Hoff. Leg. Stud. 251; 2 Prest. Abs. 118.

[3] Wms. Real Prop. 241.

CHAPTER II.

FEUDAL TENURES, SEISIN, ETC.

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§ 53. **English Law, how far applicable here.** — As a preliminary inquiry, it may be well to understand how far the common and statute law of England have been adopted as the law of this country. As a general proposition, so much of these as was suited to the condition of a people like that of the early settlers of this country was adopted by common consent as the original common law of the colonies. They brought it with them as they did their language, and regarded it as a heritage of inestimable value, by which their rights of person and property were to be regulated and secured.[1] Especially was this true in regard to the law of real property.[2] To these were afterwards added a few English statutes enacted after the emigration to this country.[3] And the construction put upon those by the English courts by their adjudications up to the time of

[1] Wheaton *v.* Peters, 8 Pet. 659; Pawlet *v.* Clark, 9 Cranch, 292; Patterson *v.* Winn, 5 Pet. 241; 1 Kent, Com. 343; ib. 473; Helms *v.* May, 29 Ga. 124; Commonwealth *v.* Chapman, 13 Met. 68, 69; Commonwealth *v.* Leach, 1 Mass. 60, 61.

[2] Sackett *v.* Sackett, 8 Pick. 309, 315–318; Marshall *v.* Fisk, 6 Mass. 31; Commonwealth *v.* Knowlton, 2 Mass. 535.

[3] Morris *v.* Vanderen, 1 Dall. 64; Blankard *v.* Galdy, 4 Mod. 222.

the Revolution also became a part of the system of colonial law which prevailed here at the time of the separation of the colonies from the mother country, and constituted their common law when they became independent States.[1]

§ 54. **Origin of Feudal Law.** — The origin of the feudal system is generally ascribed to the German tribes who overran the Western Empire at its decline.[2] Notwithstanding history is so full of the accounts of this institution during the Middle Ages, upon the Continent, it is singular that it is so uncertain to this day when it was first introduced into England, and whether even it prevailed there at all until after the Conquest, A. D. 1066. M. Guizot regards the feudal age as embracing the eleventh, twelfth, and thirteenth centuries.[3]

It has led to much learned discussion, and names of the highest respectability are found upon both sides of the question, whether the Saxons had adopted the system of feuds in the tenure of their lands prior to that period.[4] Enough, however, of the Saxon polity was subsequently wrought into the system of English estates which grew up after the Conquest to justify a brief notice of some of its peculiarities. A large proportion of their lands were held as allodial, that is, by an absolute ownership, without recognizing any superior to whom any duty was due on account thereof.[5] These lands were alienable at the will of the owner, by sale, gift,

[1] Cathcart *v.* Robinson, 5 Pet. 280 ; Baring *v.* Reeder, 1 Hen. & M. 154.

[2] Dalrymp. Feud. 1; Co. Lit. 191 *a*, n. 77 ; ib. 64 *a*, n. 1 ; 1 Spence, Eq. Jur. 30–34. See also Maine, Anc. L. 300–303 ; Irving, Civ. L. 201 *et seq.* ; Ersk. Inst. 204, 205, fol. ed. The reader is referred to the following works which treat of this subject: Pomeroy's Introd. 248, who controverts the doctrine of Mr. Spence. 11 Law Mag. & Rev. 111, which traces the system to Roman customs and law. 3 Guizot, Hist. Civil (Bohn's ed.), 20, 21, who ascribes it to a German origin. Maine, Anc. Law, 229, 230; Maine's Early Hist. of Inst. 171.

[3] 3 Hist. Civil, 4.

[4] Co. Lit. 76 *b* ; Seld. Tit. of Hon. 510, 511 ; Dalrymp. Feud. 15 ; 2 Millar's Eng. Gov. 20 ; 1 Spence, Eq. Jur. 9 ; 3 Kent, Com. 501, 8th ed., n. ; Wright, Ten. 49, 50 ; 2 Bl. Com. 48 ; Spelman. Feud. Chart. 111. See also Wms. Real Prop. 3, 4 ; 2 Hallam, Mid. Ag. 23 (ed. of 1824) ; 2 Law Mag. 608. Mr. Barrington maintains the negative, Stat. p. 69 ; while Dr. Irving (Civ. L. p. 223) considers that the system prevailed to a certain extent among the Saxons, but not with the rigor that it subsequently attained.

[5] Gilb. Ten. 2 ; 2 Bl. Com. 60 ; Wood, Civ. L. 76 ; Irving, Civ. L. 210, n., where the etymology of the term is variously traced. 2 Guiz. Hist. Civil (Bohn's ed.), 22.

or last will. They were, moreover, liable for his debts, and on his death, if undevised, descended to his heirs, and were equally divided among his sons.[1] These allodial lands, or, as they were called in Saxon, *boc lands*, might be granted upon such terms and conditions as the owner saw fit, by a greater or less estate, to take effect presently or at a future time, or on the happening of any event, in which respect, as will hereafter appear, they differed essentially from feuds or lands held under the feudal tenure.[2] The mode of conveying these lands was either by delivering possession, or some symbol of possession, such as a twig or turf; or it might be, and was most commonly done, by a writing or charter, called a *land-boc*, which, for safe-keeping, was generally deposited in some monastery.[3]

§ 55. **Saxon Tenures referred to in Colonial Charters.** — This subject has an importance beyond its mere historical interest in two ways: 1st, as explaining some of the changes wrought by William the Conqueror, in respect to the property in lands; 2d, from the circumstance that in the settlement of the terms upon which the lands in the kingdom were to be held, Kent obtained more favor than other parts of it, in being allowed to retain what were deemed Saxon rights and privileges. And when the charters of most of these Colonies were granted, reference was therein made to the tenure that prevailed in Kent, whereby the slavish and military part of the ancient feudal tenures was prevented from taking root in the American soil.[4] This subject will be more intelligible when *socage* and other tenures are explained. But it may be remembered here, that wherever, after the Conquest, lands were devisable by will, it was a relic of the old Saxon law which had prevailed at the time of Edward the Confessor.[5]

§ 56. **Allodial Lands changed to Feuds.** — Prior to the introduction of the feudal system, all lands were allodial, but from the unsettled state of Europe during the tenth and eleventh centuries, most of these were voluntarily changed into feudal

[1] 1 Spence, Eq. Jur. 20; Sulliv. Lect. 264; 2 id. 106.
[2] 1 Spence, Eq. Jur. 21.
[3] 1 Spence, Eq. Jur. 22 and n.
[4] 1 Spence, Eq. Jur. 105, n.; 1 Story, Const. 159.
[5] 2 Sulliv. Lect. 105.

estates by their proprietors, for the purpose of obtaining the protection of some neighboring baron or chieftain by becoming his vassals.

§ 57. **Feudal System introduced from Normandy.** — In no part of Europe had the feudal system obtained a stronger hold than in Normandy, and it was little more than a matter of course that William should have early taken measures to introduce it, in all its vigor, into a country which he had acquired partly by claim of title and partly by conquest.[1]

§ 58. **Theory of Feuds.** — The theory of this system was, that the property in, as well as dominion over, all lands, in any country, was originally in the king or chief who ruled over it; that the use of these was granted out by him to others, who were permitted to hold them upon condition of performing certain duties and services for their superior, who theoretically retained the property in the land itself.[2] The one who had the use of the land by his arrangement was said to *hold* of or under his superior, the one taking the name of lord, the other of vassal, and this right to hold was designated by the term *seisin*.[3] This right which the vassal acquired to hold his land, having been, at first, granted to him as a gratuity or gift of his lord, took the name of *benefice* in the early writers. Benefices were not in any sense hereditary. They were holden for the life of the grantor, or, at most, for the life of the grantee. It was through the feebleness of the successors of Charlemagne that this benefice gradually transformed itself into the hereditary fief. And the doctrine of primogeniture, whereby the entire fief went to the oldest son by inheritance, though not universal at first, became so by customary law.[4] But the more common and apt name in general use applied to it was feud, feod, fief, or fee.[5] The words by which they were originally conferred —

[1] See Maine, Anc. L. 231.

[2] 1 Spence, Eq. Jur. 34, 135; 2 Law Mag. 605; 2 Bl. Com. 53; Ayliff, 442.

[3] 1 Spence, Eq. Jur. 135; 2 Bl. Com. 53.

[4] Maine, Anc. L. 230, 232; 1 Montesq. 334; *post*, § 87.

[5] 1 Sulliv. Lect. 128; Termes de la Ley, "Feod;" 1 Spence, Eq. Jur. 34; Dalrymp. Feud. 199; Wright, Ten. 19; ib. 4; Irving, Civ. L. 200, for the etymology of the word "feud." It is mentioned by Somner, and adopted by the author last cited, that they took the name of *feuds* when they began to be granted in perpetuity, about A. D. 1000.

dedi et concessi — are still retained as operative words in modern deeds.[1] This holding of lands under another was called a *tenure*, and was not limited to the relation of the first or paramount lord and vassal, but extended to those to whom such vassal, within the rules of the feudal law, may have parted out his own feud to his own vassals, whereby he became the *mesne* lord between his vassals and his own or lord *paramount*. Those who held directly of the king were called his "tenants *in capite*," or in chief.[2]

§ 59. **Feoffment — Investiture.** — The act of conferring a *feud* or *fee* upon a vassal was called a *feoffment*,[3] while that by which he was inducted into and admitted to its actual enjoyment was an *investiture*.[4]

§ 60. **Feudal Services — Fealty.** — Every vassal, when invested with the feud, became bound to perform some acts, or render some return to his lord for the privileges of holding the same, which were called the *services* of his tenure. These might be varied according to the whim or caprice of the lord. But there was always fealty or an oath of fidelity required from the tenant to the lord, as incident to all tenures, without which no feud could subsist.[5] This fealty should be distinguished from the oath of allegiance, which is the obligation which a subject owes to his sovereign.[6]

§ 61. **Homage.** — If the feud granted was an hereditary one, the vassal was required to do homage for the same, which consisted in kneeling, in the presence of his fellow-vassals, before his lord and declaring, in the formula prescribed, that he be-

[1] 2 Bl. Com. 53.

[2] 2 Bl. Com. 59, 60. In a work styled *Liber de Antiquis Legibus*, p. xlix, published by the Camden Society, there is an inquisition respecting the manor of Newenham, in which, among the franchises belonging to the manor, were "view of frank pledge, infangthief, and gallows, to execute judgment upon him who should be taken with stolen goods within the manor; also fines for breaches of the assise of bread and beer, and for shedding of blood, with hue and cry within the manor." "Also the lord had park and warren, and the water of the Thames with the bank." This is referred to by way of illustrating the character of the grants by which manors were early held.

[3] Termes de la Ley, "Feoffment."

[4] Wright, Ten. 37.

[5] Wright, Ten. 35. For its form, see Termes de la Ley, "Fealty."

[6] Termes de la Ley, "Allegiance."

came his *homo* (*devenio vester homo*), or man.[1] *Homage* could only be done to the seignior himself; *fealty* might be made to the bailiff of the seignior.[2]

§ 62. **Proper and Improper Feuds.** — If the feud was what was called a *proper* one, the services to be rendered by the vassal were of a military character, and originally of an uncertain duration.[3] Proper feuds were the only ones known to the law at first. But in the progress of society and the arts of peace, *improper feuds*, as they were called, arose, where services of a peaceful character, such as cultivating the lord's land, an annual return of agricultural products, and the like, were substituted for those of chivalry.[4]

§ 63. **Feudal Obligation of the Lord.** — There were certain obligations of a high and solemn nature, assumed by the lords on their part towards their vassals, which will be more fully stated hereafter. But among them was that of protecting the vassal in the enjoyment of his feud, and supplying him with a new one of equal value if deprived of the same, — the latter being the origin of the doctrine of "warranty."[5]

§ 64. **Feudal Conditions of England after the Conquest.** — [The foregoing outlines the system established in England after the Conquest. Those who resisted William the Conqueror were regarded as traitors whose lands were forfeited.[6]] And in order the more effectually to carry out his plans, it is said that William seized upon and destroyed all the *boes* or written evidences of title which he could lay his hand upon, in the various monasteries of the kingdom, in which they had been deposited for safe-keeping.[7]

§ 65. **Change of Allodial Lands into Feuds.** — But still this could affect only a part of the lands in England; and as a very large proportion of them were, soon after the Conquest, held of the crown by feudal tenure, writers insist that there was

[1] 1 Sulliv. Lect. 223; 2 Bl. Com. 54; Termes de la Ley, "Homage;" Co. Lit. 64 *a*; Barringt. Stat. 182, for the details of this ceremony.

[2] 3 Guizot, Hist. Civil (Bohn's ed.), 155, 156.

[3] Wright, Ten. 5, 27 and n.; 1 Sulliv. Lect. 157.

[4] Wright, Ten. 32, 33.

[5] Wright, Ten. 38; 2 Bl. Com. 57; 1 Sulliv. Lect. 228.

[6] 2 Sulliv. Lect. 115, 117; 1 Spence, Eq. Jur. 89, 90; Wright, Ten. 62.

[7] 1 Spence, Eq. Jur. 22.

something like a general surrendering by the landholders of their lands, and an accepting and agreeing to hold the same under the king as his vassals. The time and circumstances of doing this are detailed by more than one writer. The reason for this measure, as stated by Sir Martin Wright, was that "the feudal law was at that time the prevailing law in Europe, and was then, says Sir Henry Spelman, considered to be the most absolute law for supporting the royal estate, preserving the union, confirming peace, and suppressing incendiaries and rebellions."[1] Sir Martin Wright adds, that about the twentieth year of his reign, William summoned all the great men and landholders in the kingdom to London and Salisbury, to do their homage and swear their fealty, and that this was brought about through the consent of the *commune concilium*, and he quotes the 52d law of William I. as confirming his statement.[2] Hallam ascribes to this measure of William, by which all the landholders of England, as well those who held in chief of the king as others, acknowledged fealty to the crown, the difference in the condition of the English and French aristocracy. The vassals of the latter owed dependence to their feudal lords only, and not to the crown.[3] Whatever may have been the circumstances under which this change was wrought, the 52d and 58th laws of William I. are said to have effectually reduced the lands of England to feuds, which were declared to be inheritable, and from that time the maxim prevailed there that all lands in England are held from the king, and that they all proceeded from his free bounty.[4] The lands which had been granted out to the barons — principal lands — were again subdivided, and granted by them to subfeudatories to be held of themselves. Thus, every freeholder of lands became the permanent feudatory of some superior lord, ascending in regular gradations to the head of the State, each, in addition, being bound by the oath of allegiance to the king to which his duties to his immediate lord were made to bend. The reciprocal duty of fidelity and devotion on the one hand, and pro-

[1] Wright, Ten. 63 ; Maine, Anc. L. 231.

[2] Wright, Ten. 52; id. 64–67 ; 2 Sulliv. Lect. 118, 119.

[3] Hallam, Mid. Ages, 31.

[4] 2 Sulliv. Lect. 118–121 ; Wright, Ten. 68; id. 136 ; 1 Spence, Eq. Jur. 48.

tection of the person and warranty of the estate on the other, was of the essence of this connection.[1]

§ 66. **Tenures defined.** — The reader is now prepared to understand and apply the doctrine of *tenures*. Tenure implied not only the actual holding by one of or under another, but also the terms upon which he held his lands. These were prescribed when the feud was first granted, unless it was purely a military one, where the services belonging to it were implied by law. And in the course of time these terms or services prescribed became so various that it became a maxim in the law of feuds, *Tenor investiturœ est inspiciendus*.[2]

§ 67. **Manors, how constituted and divided.** — The ancient manors were divided and occupied as follows: The lord reserved for himself a demesne contiguous to his castle sufficient for the purposes of his house, his cattle, etc. The remainder was divided into four parts. Upon one of these were settled a number of military tenants sufficient to do that part of the service which was due to his superior lord. Another was for the use of his socage tenants, who ploughed his lands or returned to him the prescribed quantity of corn, cattle, etc. One part was for the lord's villeins, who did the servile offices upon the manor, of carrying out manure, building fences, etc., at the pleasure of the lord. The remaining part was reserved as waste land, out of which the tenants of the manor supplied themselves with wood, etc., for their fires, fences, and repairing their buildings, and pasturage for their cattle upon what were called the commons.[3]

§ 68. **Greater and Lesser Barons.** — It is said that William, when he first parted his lands among his followers, gave some as many as seven hundred of these manors, others a less number, and some less than one hundred.[4] Those who received six or more were called the greater barons; those who received less, the lesser.[5]

§ 69. **Courts Baron.** — Each of these manors had a domestic

[1] 1 Spence. Eq. Jur. 92, 93; id. 95.

[2] Wright, Ten. 19–21.

[3] 2 Sulliv. Lect. 62, 63; 1 Spence, Eq. Jur. 95; Wms. Real Prop. 96.

[4] 1 Sulliv. Lect. 291. Henry II. retained in his day 1,422 manors in his own possession. 2 Lyt. Hist. Henry II. 288, cited 151 No. Westm. Rev. 59.

[5] 1 Spence, Eq. Jur. 94.

court of its own, made up of the several vassals of the lord who were freeholders, and were called the *paries curiæ*. These had important parts to perform, and among them, when feuds became alienable, of witnessing the ceremony of homage, investiture, and the like, by which lands were transferred.[1] These courts took the name of *courts baron*, although the lords of the manors in which they were held were of no higher rank than gentlemen.[2] With the exception of those in the Counties Palatine, these courts had but a trifling extent of jurisdiction over civil causes, and a limited one only over criminal ones.[3]

§ 70. **Feudal Services.** — Although services were not necessarily incident to tenure, for the lord originally might not have required them, or might have released them, they were the usual accompaniments of it.[4]

§ 71. **Fruits of Tenure.** — Among the fruits rather than services which pertained to military tenures were relief, wardship, marriage, fines, and escheats, and though most, if not all of them, were abolished with knight-service by statute 12 Charles II. c. 24, they require a few words of explanation.

§ 72. **Reliefs.** — As fiefs were, originally, voluntary gifts, it was common, upon a vassal's first entering upon his fief, for him to make a gift of some kind to his lord. And this afterwards came to be a duty imposed upon the heir upon taking possession of his inheritance.[5] This took the name of relief, and became exceedingly oppressive in its operation.[6] It is treated as a feudal service, though as remarked more technically perhaps, a fruit of feudal tenure,[7] and though originally peculiar to military feuds, extended, in time, to tenants in socage.[8]

§ 73. **Wardships.** — As feuds were granted upon the express or implied condition of performing the services required by the nature or terms of the tenure,[9] it became customary, after

[1] 2 Bl. Com. 54.
[2] Herbert, Inns of Court, 36.
[3] 2 Hallam, Mid. Ages, 33.
[4] Wright, Ten. 138.
[5] 2 Sulliv. Lect. 124; Wright, Ten. 15; 2 Bl. Com. 56.
[6] Wright, Ten. 99.
[7] Wright, Ten. 97.
[8] Dalrymp. Feud. 58; Wright, Ten. 104, ascribes it to the 40th law of Wm. I.
[9] 2 Dalrymp. Feud. 44.

feuds were hereditary, for the lord to take the lands into his own custody, and provide for the performance of the services during the minority and consequent inability of the heir to perform them, instead of resuming the feud as having been forfeited.[1] The right to do this was known as wardship, and embraced also the custody of the person of the minor.[2] As the lord was under no obligation to account for the profits of the land, it was practically a most oppressive burden upon his ward.[3]

§ 74. **Fines.** — Growing out of and akin to the last, was the right of disposing of his ward in marriage, or, upon a refusal to carry out the lord's bargain, the infant forfeited the value of such a marriage to the lord. And if the infant married without the lord's consent, the forfeiture was double that amount.[4] After feuds became alienable by consent of the lord, he required his vassal to pay a sum of money for the privilege of exercising this right, and this was called a fine.[5]

§ 75. **Escheat.** — The other incident of tenures to be noticed was escheat (*escheoir*, to happen), by which, for failure of heirs or corruption of blood by conviction of certain crimes, the feud fell back into the lord's hands by a termination of the tenure.

§ 76. **Tenure in Capite.** — There were other burdens besides these, incident to an immediate tenancy under the crown, which are referred to, not to enumerate them, but to explain the reason why the charters of Plymouth and other of the American colonies, in describing the tenure by which they were to be held, expressly exclude that *in capite* and "knight-service," the terms of these charters being "to be holden of us, our heirs and successors, as of our manor of East Greenwich in the County of Kent, in free and common socage, and not *in capite*, nor by knight-service."[6]

§ 77. **Service, free and base.** — There were two kinds of

[1] Dalrymp. Feud. 45.

[2] Wright, Ten. 90–92.

[3] 2 Bl. Com. 68, 69.

[4] 2 Bl. Com. 70; Wright, Ten. 97; Wms. Real Prop. 97. In one case the Earl of Warwick extorted £10,000 for his consent to the marriage of his female ward.

[5] 2 Bl. Com. 72.

[6] Col. Laws of Mass. 3.

services by which lands were held, distinguished as *free* and *base*, the *free* being such as free men could perform without being thereby degraded in the scale of honor and respect, the *base* being such as were performed by the peasants and persons of servile rank.[1]

§ 78. **Service, certain and uncertain.** — These were, moreover, divided into *certain* and *uncertain*, according as they were fixed and ascertained in quantity, or depended upon contingencies, and liable to be greater or less, according to circumstances.[2]

§ 79. **Socage Tenure.** — Military services were always regarded as theoretically the most honorable. But as the arts of peace obtained among the people, it came to be regarded quite as becoming the dignity of a free man to hold his lands upon condition of his paying a certain quantity of corn or cattle, or performing a certain amount of rural labor, like ploughing his lord's lands, as to be following him, harnessed up in armor, on some madcap expedition. And in process of time these came to be the common services by which lands in England were held, being, in the first place, certain and defined, and second, not military in their character.[3] This was called *socage tenure.*

§ 80. **Free and Common Socage.** — The lords often compounded with their military tenants and accepted the one class of services for the other, till the term *free and common socage* came to define a tenure where the services were *honorable* and *certain*, and yet not military.[4] Upon this tenure, all the freehold lands in England are held, at this day.[5]

§ 81. **Villeinage — Tenure.** — There was still another class of persons attached to every manor, who were substantially slaves, who performed the base and servile work upon the manor for the lord, who were, in most respects, the subjects

[1] 2 Bl. Com. 62.

[2] Id. 61.

[3] 1 Sulliv. Lect. 157. In the reign of Henry II. a pecuniary payment had been substituted in the place of the personal attendance of the military vassal, and the custom had already prevailed of hiring soldiers of fortune to do the service. Stuart's Dis. in 1 Sulliv. Lect xxxviii.

[4] 1 Spence, Eq. Jur. 52 ; Dalrymp. Feud. ch. 2, 1.

[5] Wms. Real Prop. 98 ; 1 Spence, Eq. Jur. 98 ; Stat. 12 Char. II. ch. xxiv.

of property, and belonged to the lord.[1] These were the villeins,[2] many of whom tilled the land without having any interest in or right to the soil they cultivated. By their being allowed to occupy certain parts of the manor, and, at last, to do fealty for these, there grew up a tenure called villeinage. At first, its services were not only base, such as above described, but wholly uncertain — dependent on the will of the lord. Finally, in the case of the more favored villeins, the amount of these services was defined and limited; and a tenure, thus improved in its character, took the name of *villein socage* — the services, though base, being certain.[3] This form of tenure was abolished in the reign of Charles II.[4]

§ 82. **Copyhold.** — Out of villeinage tenure grew up the modern copyholds, which, although they form an important branch of the English law of real property, have no direct application in the United States.[5]

§ 83. **Alienation of Feud — Attornment.** — To recur to the extent of ownership or quantity of estate which the vassal might acquire in his feud, it was a part of the original arrangement between William and his greater barons, that they might reward their followers by dividing out to them smaller portions of land to be held by their grantees, as vassals, in the manner already mentioned.[6] For a considerable period after the Conquest, no vassal could alien his feud, although an inheritable one, without consent of his lord, lest he might bring in an enemy to share in the domain; nor was it subject to his debts until the Stat. of Westm. 2, c. 18, A. D. 1285. On the other hand, the lord could not alien his seigniory without the consent of his feudatory, which was called an *attornment.*[7]

[1] Wright, Ten. 213; 1 Spence, Eq. Jur. 95.

[2] For the etymology of this word, see Cowel, Interpret. "Villairre;" Wright, Ten. 205, n.

[3] 1 Spence, Eq. Jur. 95; Wright, Ten. 212–215; 2 Bl. Com. 61.

[4] Lofft, Rep. 8.

[5] Wms. Real Prop. 287, 288, and note by Rawle.

[6] 1 Spence, Eq. Jur. 93, 94.

[7] 2 Bl. Com. 57; 1 Spence, Eq. Jur. 137; Wright, Ten. 168; id. 170. This *attornment* was originally performed in the presence of the *pares curiæ*, and signified the turning over from the former lord to a new one. 1 Sulliv. Lect. 227; Lindley *v.* Dakin, 13 Ind. 388.

§ 84. **Duration of and Succession to Feuds.** — But it was as competent for the lord, in parting with his feud to a vassal, to prescribe the duration of his ownership and to whom it should pass afterwards, as it was to dictate the terms and services subject to which he was to hold it. For this reason, great strictness was observed in construing and applying the language made use of in making the donation of the feud, "*ne quis plus donasse presumatur quam in donatione expresserit.*" Thus if the donation was made to a man and his sons, all the sons succeeded to the feud *in capite*, and upon the death of one of them, his share, instead of going to his brothers, reverted to the lord.[1] So if the gift was to one without any words of limitation, it was only for his own life.[2]

§ 85. **Origin of the Word "Heirs" in Grants.** — But if given to one and his *heirs*, it was understood to pass in succession, after his death, without being subject to his control by any act done by him, to his descendants, who were recognized by the feudal law as *heirs*. All the males at first took equally, but afterwards, in analogy to the military feuds, the oldest son took the whole, to the exclusion of the rest.[3] In this way it is not difficult to understand the origin and reason of the rule which requires at common law the use of the word "heirs" in a deed of grant, in order to pass a fee or estate of inheritance in the land granted, for which no synonym can be substituted.[4]

§ 86. **Law in this Country as to "Heirs" in Deeds.** — Such in this respect is the common law of this country. But it has been altered by statute in many of the States, giving to deeds, in effect, the same construction as has long been given to wills, and passing an estate of inheritance where such appears from the instrument to be the intention of the grantor.[5] And in case of a contract to convey lands without

[1] Wright, Ten. 16, 17 ; id. 151, 152.

[2] Id. 152 ; Wms. Real Prop. 47; Co. Lit. 42 *a*.

[3] 2 Bl. Com. 56, 57 ; Wms. Real Prop. 18 ; 1 Spence, Eq. Jur. 175, 176; 3 Rep. Eng. Comm'rs Real Prop. 137. Dalrymple, p. 205, states that the right of primogeniture was established by William I. It would seem that primogeniture did not obtain in respect to socage lands until the reign of Henry III. Co. Lit. 191 *a*, Butler's note, 77 ; Maine, Anec. L. 230, 231.

[4] 2 Prest. Est. 11, 12.

[5] "Heirs," or words of inheritance by statute, are not requisite to create or

specifying the estate to be granted, equity always construes it to mean a conveyance to the purchaser and his heirs.[1]

§ 87. **Of Freehold Estates, how created.** — In reference to the dignity and importance of the estates or quantities of interest in socage lands which might be created, some were denominated freehold, and others less than freehold, — the one being such as a freeman might consistently hold, the other of less duration or amount. The first of these must have been, at least, for the life of the tenant, though afterwards extended to an estate for the life of another, and finally to any estate of uncertain duration, not depending upon the will of another, and which might last for the term of a life.[2] The word *freehold* has now come to imply the quantity of estate, rather than the quality of tenure or dignity of person of the holder.[3] Such estates as these could originally be created only by livery of seisin, and at this day seisin can only be predicated of what are called freehold estates.

§ 88. **Subinfeudation.** — [The rigors of the system established by William I. were soon evaded by means of subinfeudation.] The vassal parted out his land to under-tenants, who held them of him instead of his lord, and this created a feudal tenure between the tenant and his feoffor, although it was not regarded in the light of an alienation by the

convey an estate in fee in grants or devises in the following States : Alabama, Code 1896, § 1020 ; Arkansas, Dig. Stat. 1894, § 698 ; California, Ann. Codes and Stat. 1885. § 1072 ; Colorado, Ann. Stat. 1891, § 433 ; North Dakota, Rev. Codes 1895, § 3527 ; South Dakota, Ann. Stat. 1899, § 4229 ; Georgia, Code 1895, § 3083 ; Illinois, Rev. Stat. 1895, p. 310, § 13 ; Indiana, Rev. Stat. 1894, § 3348 ; Iowa, Ann. Code 1888, § 3100; Kansas, Gen. Stat. 1889, § 1109 ; Kentucky, Gen. Stat. 1883, p. 585, § 7 ; Minnesota, Stat. 1891, § 4112 ; Mississippi, Ann. Code 1872, § 2435 ; Maryland, Pub. Gen. Laws 1888, p. 254, § 11 ; Montana, Code and Stat. 1895, § 1476 ; Nebraska, Stat. 1893, p. 651, § 49 ; New York, Rev. Stat. 1896, p. 1822, § 1 ; Tennessee, Code 1896, § 3672 ; Texas, Ann. Civ. Stat. 1899, art. 627 ; Virginia, Code 1887, § 2420 ; Wisconsin, Ann. Stat. 1889, § 2206 ; Utah, Rev. Stat. 1898, § 1970 ; Washington, Ann. Codes 1897, § 4525 ; Wyoming, Rev. Stat. 1899, § 2737 ; Nevada, Gen. Stat. 1885, § 2618 ; Oregon, Ann. Laws 1887, § 3005. So in New Hampshire, by judicial construction. Cole *v.* Lake Co., 54 N. H. 242, 289. In New Jersey and North Carolina this is limited to wills.

[1] Tud. Cas. 587.

[2] Wms. Real. Prop. 22 ; 1 Prest. Est. 203 ; 2 Bl. Com. 104 ; 1 Law Mag. 550. Mr. Pomeroy insists that no feud was at any time granted for less than a freehold. Introd. 256 ; *ante*, § 58.

[3] 1 Law Mag. 551 ; 2 Bl. Com. 103 ; 1 Prest. Est. 200 ; Wms. Real Prop. 22.

vassal, or transfer of the tenure itself, but as something to which they gave the name of *subinfeudation*, or the carving of a new and inferior feud out of the old one still subsisting.[1] This subinfeudation, though it did not relieve the vassal from the services he owed to his lord, operated unfavorably upon the latter, since the vassal had little inducement to pay a fine for the privilege of doing what he could accomplish in another way, and it besides seriously impaired his other fruits of tenure. The consequence was, when the barons extorted the Magna Charta, A. D. 1215, a clause was inserted prohibiting the subinfeudation of an entire feud, and requiring the vassal to retain enough of it to secure the services due on account of such feud.[2] And yet it is said that this clause in the Magna Charta was the first authoritative provision by law for allowing the free alienation of lands.[3]

§ 89. **Alienation of Lands under Magna Charta and Quia Emptores.** — The final blow to the custom of subinfeudation as given by the statute 18 Edward I., called the statute *Quia Emptores*, passed in 1290. It was done by giving every freeholder a right to sell a part or all of his lands, and substituted the purchaser in the place of his vendor in respect to the chief lord of the fee, requiring him to perform the services which had been due from his vendor, or, if part only of a feud was granted, the services were apportioned.[4] This statute did not extend to the king's tenants, nor did it relieve the lands of the kingdom from the burdens of tenure.[5] Every owner of a fee-simple estate has now full liberty to dispose of it by deed, since military tenures were abolished by statute Charles II., before mentioned.[6]

§ 90. **Devise of Lands ; when allowed.** — It may in this connection be observed, that there was originally the same

[1] Wright, Ten. 154, 155 and n. ; Dalrymp. Feud. 60 ; 1 Spence, Eq. Jur. 137; Van Rensselaer *v.* Hays, 19 N. Y. 72.

[2] Dalrymp. Feud. 60; Wright, Ten. 157 ; 1 Spence, Eq. Jur. 137 ; Magna Charta, ch. xxxii.

[3] 2 Sulliv. Lect. 288, 289.

[4] Wright, Ten. 160 ; 2 Sulliv. Lect. 289, 290 ; Wms. Real Prop. 56 ; Smith, Land & Ten. 5.

[5] Wright, Ten. 161 ; Van Rensselaer *v.* Hays, 19 N. Y. 72–75. This statute takes its name from the first words of the first chapter, "*Quia emptores terrarum.*"

[6] Wms. Real Prop. 80.

restriction as to devising lands by last will as there was to aliening them *inter vivos* by deed, nor could it be done except by the contrivance of uses, until the 32d and 34th Henry VIII., A. D. 1543.[1]

§ 91. **Investiture and Livery of Seisin, how made.** — [Tenants acquired their property in land by an *investiture* or *livery of seisin.*] This was accomplished by the lord, or some one empowered by him, going upon the land with the tenant, and giving him actual possession by putting into his hand some part of the premises, like a turf or twig, in the presence of the *pares curiæ*, the peers of the lord's court, who were the tenants and vassals of the lord.[2] This was technically *livery of seisin*, — the term *seisin* having a technical, complex meaning, and being, in the sense of the law, "the completion of the feudal investiture by which the tenant was admitted into the feud and performed the rights of homage and fealty." He then became tenant of the freehold.[3]

§ 92. **Livery — No Deed necessary.** — No deed or writing was necessary to complete the title of the tenant, though it was common as a mode of preserving the evidence of the transaction, as well as the terms and services upon which he was to hold, to have it written in what were called *brevia testata*, which answered to modern deeds. These were authenticated by the seal, and name or mark, of the lord, attested by some of the *pares.*[4]

§ 93. **Investiture the Equivalent of Livery.** — Another form of accomplishing the same end, which was sometimes used, and supplied the etymology of the term "investiture," was for the lord to make livery of the land by a symbol, such as delivering to the tenant a staff, a ring, or a sword, or, what was more common, putting a *robe* upon him.[5]

§ 94. **Feoffment.** — The transfer of title and possession to

[1] Wright, Ten. 172.

[2] Livery of seisin was borrowed from the Roman law in the time of the empire. 1 Spence, Eq. Jur. 139; Green *v.* Liter, 8 Cranch, 229; Thrupp, L. Tenures, 205; Güterbock, Bract. by Coxe, 114. There was a like requirement in the Mexican law. Graham *v.* United States, 4 Wall. 259.

[3] 1 Sulliv. 142; Co. Lit. 266 *b*, n. 217; Stearns, Real Act. 2.

[4] 1 Atkinson, Conv. 11; 1 Spence, Eq. Jur. 160; 1 Sulliv. Lect. 147.

[5] 1 Sulliv. Lect. 143.

the tenant by either of these modes constituted a feoffment, a term still retained, though the form has given place to modern deeds of conveyance.

§ 95. **Only one Seisin.** — In the theory of the law there was and could be but one seisin of lands. He who had that became one of the *pares curiæ*, did the services, and was recognized, at least for the time being, as the rightful owner. If there were several in possession, and one of them had the legal title, he alone had the seisin.[1]

§ 96. **Livery now obsolete.** — Livery of seisin is done away with in England by the 8th and 9th Victoria (1845), and, if it ever was made use of in this country as a mode of conveying land, it long since became merely symbolical in its nature.[2]

§ 97. **Seisin in Fact and in Law.** — Seisin, as now understood, is either *in fact* or *in law*. The first has been already described. The other occurs, for example, where an ancestor or devisor dies leaving his lands vacant; the heir in the one case and the devisee in the other are deemed, by the law, to have a seisin, which may at any time be converted into a seisin in fact.[3] To constitute a seisin in fact, there must be an actual possession of the land; for a seisin in law, there must be a right of immediate possession according to the nature of the interest, whether corporeal or incorporeal.[4]

§ 98. **Seisin in Fact defined.** — [Seisin in fact is the pos-

[1] Lit. § 701. Cornell *v.* Jackson, 3 Cush. 506. So essential was livery of seisin to the transfer of lands, that one reason why lands were not devisable after they had become alienable was that the devisor, being dead when his will was to take effect, could not make the necessary livery. 1 Spence, Eq. Jur. 136.

[2] 1 Spence, Eq. Jur. 156. Sullivan, in his treatise on Land Titles, says that when the country was first settled the ceremony of livery of seisin was in use, and mentions an instance where the council of Plymouth made livery to Vines and Oldham of their patent on Saco River, in 1642, and that from that time the ceremony was observed in York, Me., until 1692. Massachusetts dispensed with this form by statute in 1642, and in Plymouth it was very early superseded by deed acknowledged and recorded. Colony L. p. 85, 86. Judge Kent asserts that "we have never adopted in this country the common-law conveyance by feoffment, livery," etc. 4 Kent, Com. 84.

[3] Stearns, Real Act. 2; Co. Lit. 266 *b*, n. 217; Banister *v.* Henderson, Quincy, 123.

[4] Co. Lit. 266 *b*, n. 217; Cowell, Interp. "Seisin;" Com. Dig. "Seisin," A. 1 and 2; 2 Prest. Abs. 282.

session of land by one claiming a freehold interest therein;[1] and the possessor of land under claim of title, however wrongful, is regarded in law as the owner until he is ousted by one having a better title.[2]] So one in possession of land, though he is not able to show any title,[3] may have trespass against a stranger who enters upon it.

§ 99. **Seisin presumed from Possession and Title.** — If one enters upon an estate having title thereto, the law presumes the possession to be according to his title, without requiring any other proof of intent.[4] So if several persons have a mixed possession, as it is called, of land, and one of them has title to it, the seisin belongs to him only.[5] For though there may be a concurrent possession, there cannot be a concurrent seisin of lands.[6] But if one have possession without title, an intent thereby to gain the seisin must be proved in order to give it that effect.[7]

§ 100. **Seisin — Presumption of Continuance.** — If a seisin by one is proved or admitted, it will be presumed to continue till the contrary is shown.[8]

§ 101. **Seisin necessary to Valid Feoffment.** — No one who has a seisin and title to land will lose his seisin by any entry by a stranger, so long as he retains the possession.[9] Accordingly, if a man entered and made a feoffment, the owner being upon the land, the feoffment was void.[10]

§ 102. **Permissive Occupation not Disseisin.** — Nor will one gain a seisin by occupying lands by permission of the owner. And if he enter by such permission, nothing short of open

[1] Slater *v.* Rawson, 6 Met. 439; Co. Lit. 153 *a*; Towle *v.* Ayer, 8 N. H. 57. But that *seisina* and *possessio* are used "promiscuously," see Güterbock Bract. by Coxe, 90.

[2] Linthicum *v.* Ray, 9 Wall. 241.

[3] Look *v.* Norton, 55 Me. 103.

[4] Means *v.* Welles, 12 Met. 356; Barr *v.* Gratz, 4 Wheat. 213; Green *v.* Liter, 8 Cranch, 229; Gardner *v.* Gooch, 48 Me. 487.

[5] Slater *v.* Rawson, 6 Met. 439; Barr *v.* Gratz, 4 Wheat. 213; Mather *v.* Ministers, etc., 3 S. & R. 511; Winter *v.* Stevens, 9 Allen, 526.

[6] Monroe *v.* Luke, 1 Met. 459, 466; Langdon *v.* Potter, 3 Mass. 215.

[7] Bradstreet *v.* Huntington, 5 Pet. 402; Ewing *v.* Burnet, 11 Pet. 41, 52.

[8] Brown *v.* King, 5 Met. 173.

[9] 2 Prest. Abs. 293; Slater *v.* Rawson, 6 Met. 439; Anon., 1 Salk. 246.

[10] Surry *v.* Pigott, Poph. 170, 171.

and unequivocal acts of disseisin done by him and known to the owner can deprive the latter of his seisin.[1]

§ 103. **Conveyance by Disseisee.** — If one has a freehold title to lands and enters upon any part of them, he by that simple entry gains a seisin of all the lands in the possession of the same tenant to which he has title in the county. And where one has been disseised and wishes to convey the lands, which he cannot do in most States[2] till he regains his seisin, it is the usual way to go upon some part of the premises and there deliver his deed to his vendee, the seisin in such case passing with the deed.[3]

§ 104. **Seisin of Heir.** — If a freehold title descends to one as heir, the law invests him with the seisin without entry upon the land.[4]

§ 105. **Seisin of Devisee.** — If wild or vacant lands are devised, the law gives the devisee a constructive seisin. But if they are possessed adversely, he must make an entry, or do some equivalent act to gain a seisin.[5]

§ 106. **Seisin of Grantee.** — The acts necessary to create a seisin in a grantee of lands are generally prescribed by statute in this country, or borrowed from the English statute of uses. How this statute operated to vest the seisin in the grantee will be explained in connection with uses. As a general proposition, by the law in this country, the making, delivery, and recording of a deed of land passes the seisin thereof without any formal entry being necessary.[6]

§ 107. **Several Estates — One Seisin.** — It is somewhat more difficult to make the application of the doctrine of seisin clear when it is considered in relation to estates of which present

[1] Hall *v.* Stevens, 9 Met. 418 ; Clark *v.* McClure, 10 Gratt. 305.

[2] This provision of the act 32 Hen. VIII. c. 9, against champerty and maintenance has been abrogated by statute in many States, and in some has been recognised by the courts as obsolete. See *post*, § 2216 *et seq.*

[3] Proprietors *v.* Springer, 4 Mass. 416 ; Stearns, Real Act. 44 ; Ellicott *v.* Pearl, 10 Pet. 412 ; Spaulding *v.* Warren, 25 Vt. 316 ; Green *v.* Liter, 8 Cranch, 247, 250 ; Güterbock Bract. by Coxe, 90, 95.

[4] Brown *v.* Wood, 17 Mass. 68 ; Green *v.* Chelsea, 24 Pick. 71.

[5] Jackson *v.* Howe, 14 Johns. 405 ; Ward *v.* Fuller, 15 Pick. 185 ; Brown *v.* Wood, 17 Mass. 68 ; Green *v.* Chelsea, 24 Pick. 71.

[6] 4 Greenl. Cruise, 45, n., and 47, n. ; Smith, Land. & Ten. (Am. ed.) 6, n. ; McKee *v.* Pfout, 3 Dall. 486.

possession cannot be predicated. Thus, there may be an estate for years in one, and the reversion or remainder in fee in another, or an estate for life in one with a reversion or remainder in fee in another; and the question arises, how are these several estates affected by the matter of seisin, since every freehold must have a seisin, and there can be only one seisin at a time of an estate.

§ 108. **Seisin of Reversioner.** — In the case of a reversion after an estate for years, there would be no difficulty, since the one who creates the lease and gives the tenant possession reserves the rest of the estate to himself, and with it the seisin, because, though a tenant for years holds the possession, he cannot hold the seisin of lands. In such case the tenant's possession is subordinate to the right of the reversioner, and does not disturb the seisin which he had before he made the lease.

§ 109. **Seisin of Vested Remainder-man.** — In the case of a vested remainder, inasmuch as the leasehold estate or term, and the remainder, or the estate after its expiration, are created at one and the same time, and by one and the same act, the possession given to the lessee or termor enures to the benefit of the remainder-man, under whom he is henceforth to hold his estate, the lessor and grantor having parted with his entire interest. So that the livery of possession to the lessee, in such case, operates as a livery of seisin to the remainder-man, and vests it in him, the lessee being, as it were, his bailiff to accept livery for him.

§ 110. **Seisin of Particular Estate.** — If the estate, prior to the reversion or remainder, technically called the particular estate, is a freehold, or one for life, the seisin, as well as the possession, passes to and stops in the tenant of the freehold, because there must be a livery of seisin to him to create his own estate, and he must continue to hold the seisin. "The fee is intrusted to him." In such case, the livery made to the tenant of the freehold enures to the benefit of the reversion or remainder, and passes to the reversioner or remainder man instantaneously upon the determination of the particular estate.

§ 111. **Seisin of Successive Vested Remainders.** — Such would be the case if there were ever so many practicable

successive vested estates in remainder, the seisin attaching to the estate of each as it successively came to be entitled to the possession.

§ 112. **Successive Estates — To whom Livery made.** — In all these cases, whether the particular estate or term be for years or for life, the act of livery of seisin is done to the one who takes the first estate with the right of possession.[1]

§ 113. **Remainder-man cannot make Livery.** — But if the reversioner or remainder-man wishes to dispose of his interest, which the law regards an actual estate, though to be enjoyed in future, and if the land itself is in the possession of the tenant for years or for life, he obviously cannot make an actual livery of seisin to his grantee, because to do so he must enter and commit a trespass upon the lands. And, besides, as above stated, if the tenant have a freehold, the remainder-man or reversioner has no seisin which he can pass to a third person.

§ 114. **Exception to Foregoing Rule.** — But, inasmuch as he has the seisin, if the possession be in a tenant for years, he may, by consent of the latter, enter upon and make effectual livery of seisin of the land, the possession of the tenant thereafter enuring, so far as the seisin is concerned, to the benefit of the grantee.[2]

§ 115. **Reversioner or Remainder-man may convey by Grant.** — The only way, therefore, by which a reversioner or remainder-man can convey his estate, if it be expectant upon an estate of freehold in another, or upon an estate for years, where the tenant refuses to permit livery of seisin to be made, is by a deed of *grant* without livery, the grantee being thereby substituted in respect to the estate to all the rights, including the enuring of the benefit of seisin which belonged to his grantor.[3]

§ 116. **Explanation of Terms.** — This may serve to explain the expressions "seisin *in law* of a reversion or remainder,"

[1] Spence, Eq. Jur. 156, 157; 2 Flint. Real Prop. 258, 259; id. 572; 1 Atk. Conv. 16; Lit. § 60; Co. Lit. 49; 1 Law Mag. 274, 275; Co. Lit. 266 *b*, Butler's note, 217; 2 Bl. Com. 166.

[2] 1 Atk. Conv. 16; 2 Flint. Real Prop. 572; Co. Lit. 48 *b*, n. 318; id. 15 *a*.

[3] 1 Atk. Conv. 16; 2 Flint. Real Prop. 576; 2 Prest. Abs. 283; Wms. Real Prop. 208.

"seised in possession," and "seised in reversion or remainder," as well as "vested in reversion or remainder," which are found in books treating of this subject.[1] And without adverting to what constituted, in the ancient law, a seisin in law, as contradistinguished from a seisin in deed, it is sufficient to say that for centuries the language of the law has been that a reversioner is "seised" of the reversion, although dependent upon an estate for life. By this, no more is meant than that he has a fixed, vested right of future enjoyment of it.[2] This results from the rule of law, that where lands of inheritance are carved into different estates, the tenant of the freehold in possession and the persons in remainder or reversion, are equally *in* the seisin of the fee, except that the tenant in possession has the actual seisin of the lands.[3]

§ 117. **Disseisin.** — If one is wrongfully deprived of his seisin, it is technically called a *disseisin*, the one who does the act being a *disseisor*, and the one who thereby loses the seisin, a *disseisee*.

§ 118. **"Tenure" in this Country.** — In the opinion of Judge Kent, the question of *tenure* as an incident to the ownership of lands "has become wholly immaterial in this country, where every vestige of tenure has been annihilated."[4]

[1] 2 Prest. Abs. 282.

[2] Cook *v.* Hammond, 4 Mason, 467, 488; Plowd. 191.

[3] Co. Lit. 266 *b*, Butler's note, 217; Van Rensselaer *v.* Kearney, 11 How. 300, 319.

[4] 4 Kent, Com. 24.

CHAPTER III.

ESTATES IN FEE-SIMPLE.

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§ 119. **Distinction between Property and Title.** — There is a property or interest in lands or other things coming within the class of realty, which is something distinct from the *title* by which it is held, or the mode by which it is acquired.[1]

§ 120. **Property in Realty defined.** — It is, in its very nature, abstract, being predicated alike of what is corporeal and incorporeal, and independent of possession or actual enjoyment. It is capable, moreover, of assuming various forms and of existing under such different relations as often to give rise to complex rules and subtle and refined distinctions, which it becomes the business of a lawyer to detect and explain. A man may be the sole owner of an acre of land as his absolute property; or he may have a right to a temporary use and enjoyment of it, while another may have a right to it after a term of years or after the death of some one; or he may have the possibility of owning it and enjoying it if a certain contingent event shall happen; or he may be liable to lose the present enjoyment of it if such event occur, and the like. And these are but a few of the different forms in which property in or ownership of what is called realty may present itself to the mind.

§ 121. **Title explained.** — And this, it will be readily perceived, is something distinct from the *title* by which such property is held, or the mode in which it may be acquired. A man may be regarded as the absolute owner of a farm, but that does not indicate how he acquired it, or what the nature of his title to it is. He may have obtained it by deed, by will, or by inheritance; or he may have entered upon it

[1] See, upon this subject, Maine, Anc. L. 290 *et seq.*

without any right, and held it long enough to give him a valid legal title to it.[1] Title is the means by which an estate is acquired.

§ 122. **Treatment of the Subject.** — The division of the subject therefore is into, 1st, the nature and extent of the property or interest which one may have in lands or the realty; and 2d, the title by which that property is acquired and held. To treat of these in their order, it may be well, first, to consider property in reference to its duration or extent as to time; second, in reference to the circumstances under which it may be held and enjoyed, whether in severalty or in connection with others and the like; third, in reference to its being absolute or conditional; fourth, in reference to its being the subject of present or future enjoyment, of possession or expectancy; and lastly, in reference to its being regarded as legal or equitable in its character, that is, fixed and regulated by the rules of the common law or by those of equity.

§ 123. **Estate defined.** — The property or interest which one has in lands, tenements, or hereditaments is expressed by the word *estate*. And the extent or degree of this interest is indicated by the terms by which different estates are designated. Thus an estate in fee-simple conveys at once the idea of an interest of an unlimited duration, without any words of explanation. It is called estate, from *status*, signifying the condition or circumstances in which the owner stands with regard to his property.[2]

§ 124. **Estates, how divided — Freeholds.** — The first division of estates is into those of freehold and those less than freehold. These estates of freehold are again divided into those of inheritance and those not of inheritance. All estates of inheritance in tenements are freehold, but the converse of the proposition is not true, since freeholds embrace estates for life and those of indefinite duration, which may endure for a life. And now, in ordinary use, without explanatory words, the term "freehold" would be understood as denoting an estate for life as distinguished from an estate of in-

[1] See *post*, § 1822.

[2] 2 Bl. Com. 103; Co. Lit. 345 *a*; Burton, Real Prop. § 12. It is said by Lord Holt, "Estate comes from *stando*, because it is fixed and permanent." Bridgewater *v.* Bolton, 6 Mod. 106, 109; Co. Lit. 9 *a*.

heritance, or one that goes to the owner's heirs at his death.[1]

§ 125. **Estates less than Freehold.** — Estates less than of freehold, such as estates for years, are called *chattel* interests or estates; if they continue for a longer period than the life of the tenant, they go like chattels to his personal representatives, his executor or administrator.[2]

§ 126. **Freeholds defined.** — *Freehold* implies such an estate as could only be created under the common law by livery of seisin,[3] and one which a freeman might consistently hold in reference to its tenure, and, of course, excluded all lands held in villeinage, even though held for the term of a life.[4] The term, moreover, is used in two senses: first, as indicating the quantity of interest; and second, the quality of the tenure.[5] And although no estate of freehold, whether in possession or remainder,[6] could be created without livery of seisin; yet, in view of the doctrine of uses having done away with actual livery of seisin, the proper definition of the term seems to be "an estate of inheritance or for life in real property, whether it be a corporeal or incorporeal hereditament."[7]

§ 127. **The Freehold cannot be put in Abeyance.** — There must always be some one to carry the seisin.[8] Therefore, a freehold at common law could not be created to commence *in futuro*. It could only be created by livery, which was a present act, operative *in præsenti*. Therefore a conveyance of a freehold to a person unborn or unascertained would be void.[9] But this does not apply to remainders or reversions. A reversion is an estate in expectancy to take effect in possession and enjoyment after the expiration of an intermediate estate, and a remainder is not only an estate in expectancy, but it may be ever so contingent and uncertain, and be good, if,

[1] Co. Lit. 266 *b*, n. 217; 1 Law Mag. 551; Burton, Real Prop. § 17; 1 Prest. Est. 203.

[2] Burton, Real Prop. § 1; 1 Prest. Est. 203.

[3] 2 Bl. Com. 104; 1 Prest. Est. 209.

[4] 1 Prest. Est. 209; id. 213; Wms. Real Prop. 22.

[5] 2 Woodd. Lect. 5.

[6] 2 Prest. Abs. 282; 2 Bl. Com. 104.

[7] 2 Bl. Com. 104, Christian's note; 1 Law Mag. 555.

[8] 1 Prest. Est. 216; id. 250.

[9] 1 Prest. Est. 220.

until the contingency is determined so as to have it vest or fail altogether, there be an *intermediate* estate of freehold in some third person.[1] And where one holding a freehold in reversion conveys it in terms, from the expiration of the intermediate estate, courts will construe it a present conveyance of a present freehold, the enjoyment of which is postponed till the expiration of the prior estate.[2]

§ 128. **A Freehold must be continuous.** — If limited[3] to A every Monday, B every Tuesday, and so on, it would be void. And one reason for this, among others, is, that there could be no tenant to the *præcipe* to answer to and defend suits for the recovery of the land; the party proper to be sued to-day would cease to be the one to defend to-morrow.[4] For the same reason, a freehold cannot be put in abeyance by the act of the party.[5]

§ 129. **Duty of Freeholder — Tenant of the Præcipe.** — It was a part of the freeholder's duty at common law to defend the estate against claims which a stranger might make upon it. And if a tenant of a less estate than a freehold was disturbed by one claiming the land, he depended upon him who had the immediate freehold to protect and maintain his interest, and might, to this end, "pray the aid" of him who had the title, to defend suits brought to recover the land. So where the tenant, of whom the inheritance was demanded, was himself a mere freeholder, he had a right to pray aid from the reversioner or remainder-man, and bring him forward to defend the title.[6] As the *præcipe* was a process to recover a freehold, no one having a less estate could defend against it, and therefore none other could, in the language of the law, be "tenant to the *præcipe*."[7] "The law will rather give the land to the

[1] 1 Atk. Conv. 11.

[2] Law Mag. 555, cites Weale *v.* Lower, Pollexf. 66; 1 Prest. Est. 225.

[3] This term has a technical meaning, implying not only the conveying of land, but the fixing of the limits or extent of the interest conveyed, as limiting lands to A B for life, and the like.

[4] 1 Prest. Est. 218; id. 252, 253; 1 Law Mag. 561.

[5] 1 Prest. Est. 216; 1 Law Mag. 557.

[6] 1 Prest. Est. 207.

[7] 1 Prest. Est. 206–208; Stearns, Real Act. 100–102; Termes de la Ley, "Aid." See *post*, § 236.

first comer, which we call an occupant, than want a tenant to a demandant's action." [1]

§ 130. **Effect of Judgment against Life Tenant.** — The tenant for life was intrusted with the protection of the possession for the benefit of the remainder-man in fee. And a judgment against him on demand of right and inheritance was, in effect, a judgment against him in reversion or remainder, and took away the seisin from them, rendering it necessary that they should become demandants instead of being defendants of the right.[2]

§ 131. **Aliens as Freeholders — Office Found.** — As to who may be freeholders, there is no exception in this country, beyond the disability in some States arising from alienage. By the common law, the chief difficulty, in this respect, is in acquiring title rather than in holding the estate when acquired. Thus an alien may purchase lands or take them by devise and hold them against all the world but the State. Nor can he be divested of his estate, even by the State, until after a formal proceeding called "office found;" and, until that is done, may sell and convey or devise the lands, and pass a good title to the same.[3] [And if an alien purchase lands and afterwards become naturalized before office found, he acquires an indefeasible estate.[4]] But an alien cannot take lands by descent, nor transmit them to others as his heirs by the common law.[5]

§ 132. **Aliens may purchase from State — Removal of Disability.** — But if the alien purchase of the State, the latter cannot claim the land of the alien nor of his heirs.[6] But the disability of alienage is removed, in whole or in part, in

[1] 1 Bacon's Tracts, 331.

[2] 1 Prest. Est. 207; 1 Atk. Conv. 11.

[3] Montgomery *v.* Dorion, 7 N. H. 475; Orr *v.* Hodgson, 4 Wheat. 453; Fox *v.* Southack, 12 Mass. 143; Mooers *v.* White, 6 Johns. Ch. 360, 365; Wms. Real Prop. 58; 1 U. S. Dig. "Alien," §§ 62, 63, 66.

[4] Harley *v.* State, 40 Ala. 689.

[5] Orr *v.* Hodgson, 4 Wheat. 453; Mooers *v.* White, *ubi supra*, where it is said "the law *qua nihil frustra* never casts the freehold upon an alien heir who cannot keep it." Jackson *v.* Lunn, 3 Johns. Cas. 109; 1 U. S. Dig. "Alien," § 61; Doe *v.* Lazenby, 1 Smith (Ind.), 203.

[6] Commonwealth *v.* Andre, 3 Pick. 224; Goodell *v.* Jackson, 20 Johns. 693, 707; Governeur *v.* Robertson, 11 Wheat. 332.

most of the United States. [The statutory law on the subject, as it stands in the various States, is given in the note.[1]

[1] *Alabama.* Aliens have the same rights as citizens. Code (1896), § 419.

Arkansas. Aliens have the same rights as citizens. Dig. of the Stat. (1894) § 247.

California. Aliens may take and hold estates as citizens if residents; if not, they may inherit if they come and claim within five years after the inheritance falls to the heir. Deering's Codes and Stat. vol. ii. §§ 671, 672.

Colorado. Resident aliens have the same rights as citizens. Mill's Stat. (1891) § 99.

Connecticut. Resident aliens have the same rights as citizens. Rev. Stat. (1888) § 15.

Delaware. Resident aliens, having declared their intention to become citizens of the United States, have the same rights as citizens. Rev. Code (1874), p. 493.

Florida. Aliens have the same rights as citizens. Rev. Stat. (1892) § 1816.

Georgia. Aliens, the subjects of governments at peace with the United States and this State, have the same rights as citizens. Codes (1895), § 1816.

Idaho. Aliens who have not declared their intention to become citizens of the United States cannot acquire land or title thereto, other than mineral lands or such as may be necessary for working the same. Chinese have not this right. Aliens may enforce liens and judgments against real property and may take by inheritance, but the property must be disposed of within five years. Sessions Laws, 1890, 1891, pp. 108, 118.

Illinois. Aliens have the same rights as citizens to acquire real property, but their right to hold the same is limited, in the case of adults to six years from the time of acquisition, or in the case of minors, to six years from attainment of majority. At the expiration of that time it is subject to be escheated unless it shall have been conveyed in the meanwhile to a *bona fide* purchaser for value, or such alien shall have become a citizen of the United States. Session Laws, 1897, p. 5.

Indiana. Resident aliens who have declared their intention to become citizens of the United States have the same rights as citizens. All other aliens may take and hold land by devise or descent only, and are allowed five years in which to convey the same. Rev. Stat. (1894) §§ 3332, 3333.

Iowa. Resident aliens have the same rights as citizens. Const., Art. I. § 22. Non-resident aliens may acquire and hold real property within the limits of an incorporated city or town, or lands not to exceed one hundred and twenty acres in the name of one person, and may alienate or devise it. Beyond this they may take by devise or descent and hold for twenty years. At the expiration of that time the land shall escheat to the estate unless it shall have been conveyed to a *bona fide* purchaser for value, or such aliens shall have become residents of the State. Code (1897), § 2889.

Kansas. Any alien resident of the United States who shall declare his intention of becoming a citizen of the United States may acquire real property in any way, and may during six years thereafter dispose of the same as could a citizen, upon complying with certain conditions of registry. Non-resident aliens are debarred from acquiring title to real property, except that the heirs of aliens who acquire title to lands may take such lands by descent or devise and hold the same for three years, in the case of adults; or five years in the case of minors; subject to escheat,

An act of Congress (29 Stat. at Large, 618) defines and regulates the right of aliens to hold and own real property in

if, meanwhile, the land shall not have been sold to a *bona fide* purchaser for value, or such alien heirs shall not have become residents of the State. But minor aliens, residents of the United States, may acquire title to lands by purchase and hold the same for six years after they might declare their intention to become citizens of the United States, subject to escheat as above. Gen. Stat. (1897) vol. i. p. 532.

Kentucky. Aliens, not enemies, having declared their intention to become citizens of the United States, have the same rights as citizens. Other aliens may take by devise or descent and hold for eight years. Stat. (1894) § 334 *et seq.*

Louisiana. The common-law disability of alienage, growing out of the feudal tenure of lands, was unknown to the civil law, which is the basis of the law of this State — the title to land under the civil law being allodial. In this State there are no statutory restrictions upon the right of aliens to acquire real property.

Maine. Aliens have the same rights as citizens. Rev. Stat. (1883) c. 73, § 2.

Maryland. Aliens, not enemies, have the same rights as citizens. Pub. Gen. Laws (1888), vol. i. p. 9.

Massachusetts. Aliens have the same rights as citizens. Pub. Stat. (1882) p. 744, § 1.

Michigan. Aliens have the same rights as citizens. Howell's Stat. (1882) § 5775.

Minnesota. Aliens who have not declared their intention to become citizens of the United States cannot acquire real property except by devise or inheritance. This act does not apply to rights by treaties, or to the actual settlers upon farms of not more than one hundred and sixty acres. Aliens may acquire and hold six lots of fifty feet frontage by three hundred feet in depth in any incorporated city. They may enforce liens and judgments. Stat. (1891) § 3996.

Mississippi. Resident aliens have the same rights as citizens. Non-resident aliens may only acquire and hold realty by the enforcement of liens and judgments, and then only for twenty years. Code (1892), § 2439.

Missouri. Aliens have the same rights as citizens. Rev. Stat. (1889) § 342.

Montana. Aliens have the same rights as citizens to acquire mining property. Const. Art. III. § 25. Resident aliens inherit as citizens, also non-resident aliens if they claim within five years from death of the ancestor. Stat. (1895) Div. II. § 1867.

Rhode Island. Aliens have the same rights as citizens. Gen. Laws (1896), p. 652, § 4.

South Carolina. Aliens have the same rights as citizens. Rev. Stat. (1893) §§ 1880, 1981, 1982.

South Dakota. Aliens have the same rights as citizens. Stat. (1899) §§ 3598, 4606.

Tennessee. Aliens have the same rights as citizens. Code (1896), §§ 3659–3662.

Texas. Resident aliens have the same rights as citizens, except that if they discontinue their residence they must dispose of the property within ten years. Aliens may acquire and hold lots in an incorporated or platted city, town, or village without any limitation. They may enforce liens or judgments and take by devise or descent; but unless they become residents or declare their intention to become citi-

Territories of the United States, other than the District of Columbia. The provisions of this act are somewhat lengthy and complicated and will not be given here. By 33 Vict. c. 14, aliens are placed on the same footing with citizens as to acquiring and disposing of real property in the United Kingdom.]

§ 133. **Corporations as Freeholders.** — At common law, corporations might take and hold and dispose of real estate for any purposes not inconsistent with those for which they were created.[1]

§ 134. **Acts of Mortmain.** — In England, from the time of the Magna Charta, corporations have been restrained from holding lands by what are called statutes against mortmain, or holding in dead hands. But these seem not to have been

zens they must dispose of the property within ten years. Batt's Civ. Stat. tit. 3 (1897).

Utah. Aliens may take by descent and be inherited from as citizens. Rev. Stat. (1898) § 2847.

Vermont. The common-law restrictions against aliens being founded on the feudal tenure of the land and the impossibility of requiring the alien to render military services, and title to land in this State being allodial in fact, if not in name, it is declared that the common-law disabilities of aliens do not exist. State *v.* Boston, Concord, & Montreal R. R. Co., 25 Vt. 433.

Virginia. Aliens, not enemies, have the same rights as citizens. Code (1887), § 43.

Washington. The ownership of lands by aliens other than those who in good faith have declared their intention to become citizens of the United States is prohibited, except where acquired by inheritance, under mortgage, or in good faith in the ordinary course of justice in the collection of debts. Conveyances to or in trust for aliens are void. The prohibition, however, does not extend to mineral lands, and the lands necessary for the development thereof and the manufacture of their products. Const. Art. II. § 33.

West Virginia. Aliens, not enemies, have the same rights as citizens. Code (1891), p. 632, c. 70.

Wisconsin. Resident aliens have the same rights as citizens. Non-resident aliens cannot acquire by purchase more than three hundred and sixty acres. Stat. (1889) §§ 2200, 2200 *a*.

Wyoming. No distinction between resident aliens and citizens. Const. Art. I. § 29. As to non-resident aliens, the laws previously in force in the Territory are continued in force. Const. Art. XXI. § 3. Non-resident aliens who have not declared their intention to become citizens of the United States are not allowed to acquire any real estate except such as may be acquired by inheritance, or in good faith in the ordinary course of justice in the collection of debts created prior to March 3, 1887. U. S. Stat. at Large, vol. xxiv, p. 476.

[1] Sutton Parish *v.* Cole, 3 Pick. 232, 239; Ang. & Ames, Corp. ch. v. § 1; Warden *v.* S. E. Railway, 21 L. J. N. S. Ch. 886.

adopted in any of the United States except Pennsylvania, where no corporation may hold lands unless specially authorized by act of the Legislature.[1] This power to hold land, it seems, may belong to corporations created by States other than where the lands are situate, unless the laws of the latter State restrain it.[2]

§ 135. **Corporations as Freeholders in this Country.** — Corporations in this country are generally limited in the acts creating them as to the value or amount of real estate they may hold. And the question has been made as to the effect of their holding a larger amount than that prescribed. The rule seems to be this: If the property, when purchased, does not exceed the sum limited, their title to it cannot be affected by its rising in value to a greater amount than that; if of greater value at first, nobody can disturb their title to it except the State.[3]

§ 136. **Estates — Treatment of Subject.** — In treating of estates, we shall first consider that out of which the others are derived or carved,[4] and then treat of these in their order of importance as measured by quantity or duration.

§ 137. **Fee-simple — Definition.** — Adopting this order, the first of these is an estate in *fee-simple*. Fee, as is originally used, signified land holden of some one as distinguished from allodial lands, fee and feud being synonymous terms. But now it is ordinarily used to denote the *quantity of estate in land*, and is confined to estates of inheritance, or those which may descend to heirs. So that fee may be considered as in itself implying an inheritance.[5] When the term "*fee-simple*" is used, it means no more than *fee* when standing by itself, as understood in respect to modern estates. But it excludes all restriction as to the persons who may inherit it as heirs, to distinguish it from a fee-tail, which, though inheritable,

[1] Ang. & Ames, Corp. ch. v. § 1; 2 Kent, Com. 282, 283 and note; Lathrop *v.* Com. Bank, 8 Dana, 119. The English statute of mortmain (9 Geo. II. c. 26) did not extend to Massachusetts. Jackson *v.* Phillips, 14 Allen, 539, 591.

[2] Ang. & Ames, Corp. ch. v. § 1; Thompson *v.* Waters, 25 Mich. 214.

[3] Bogardus *v.* Trinity Church, 4 Sand. Ch. 633, 757.

[4] 1 Prest. Est. 424.

[5] Co. Lit. 1 *a*, n.; Termes de la Ley, "Fee;" Wright, Ten. 149; Lit. § 1; 2 Bl. Com. 106.

will descend only to certain classes of heirs, as well as from an estate which, though inheritable, is subject by the terms of its creation to condition or collateral determination.[1]

§ 138. **Fee-simple — Incidents.** — The owner of a fee-simple has the fullest power of disposing of the estate, and, if he fails to do this, it descends to such of his kindred, however remote, as the law marks out as his heir.[2]

§ 139. **Fees defeasible.** — It is not necessary, however, that the estate should be absolutely indefeasible, if, until it is defeated, it is subject to unlimited alienation and descent, as would be the case with lands acquired and held by disseisin. The disseisor, so long as he holds, has in law a fee-simple estate, though liable to be defeated by the rightful owner recovering his seisin,[3] and one reason is, there cannot be two fees-simple in the same land.[4]

§ 140. **Fees defeasible, continued.** — So an estate is generally called a fee-simple, though it may be granted on condition, liable to be defeated on the happening of some future event. Until that happens, and until the grantor or his heirs or devisees enter and put an end to the estate, it has all the qualities of a fee-simple. This is also true in respect to an estate which is subject to be defeated by something collateral to it which may never happen, but if it happens, the estate is at an end; which, as will be seen, is regarded as a base fee as distinguished from a technical fee-simple, as if, for instance, the grant be to one and his heirs till A returns from Rome.[5]

[1] Wright, Ten. 146; Co. Lit. 1 *b*; 2 Bl. Com. 106; 1 Prest. Est. 420; Lit. § 293.

[2] Burton, Real Prop. § 14; 1 Atkinson, Conv. 179, 183; Currier *v.* Gale, 9 Allen, 522.

[3] 1 Prest. Est. 426.

[4] Id. 423. The relation of the disseisor to the estate, so far as the disseisee is concerned, is this: The disseisee may have an action of trespass against the disseisor for the act of entry, but after the disseisin made, he cannot recover for the mesne profits, since they follow possession, until the disseisee regains his possession by entry, when the disseisor becomes a trespasser *ab initio*, and liable in trespass for the mesne profits. Gilbert, Ten. 41; 2 Rolle, Ab. 553, 554; Bigelow *v.* Jones, 10 Pick. 161; Abbott *v.* Abbott, 51 Me. 575, 579; Allen *v.* Thayer, 17 Mass. 299; Lehman *v.* Kellerman, 65 Penn. St. 489.

[5] 1 Cruise, Dig. 55; 1 Prest. Est. 431. Though the term *fee-simple* is applied in the manner above stated, and Coke divides it into fee-simple absolute, fee-simple conditional, and fee-simple qualified or base fee, yet in point of accuracy it cannot

§ 141. **Alienation incident to Estates in Fee — History.** — One of the most important present incidents to a fee-simple is the right of free and unlimited alienation.[1] This right of alienation seems to have been gradually acquired, feuds for some time after the Conquest being inalienable. When first allowed, it could only be done by consent of the lord, for which a fine had to be paid.[2] And when feuds were first granted to a man and his heirs, the heirs were considered as having been included as donees of the estate, and the feudatory could not alien the land without consent of the heir presumptive.[3]

§ 142. **Alienation of Fees — History.** — The right of defeating the expectation of collateral heirs by alienation had been acquired as early as the time of Henry I. so far as it related to estates obtained by purchase. In the time of Henry II. this right was extended to a reasonable part of his family inheritance, though he could not disinherit his oldest son.[4] Bacon says that, "in Glanville's time (Henry II. 1154–1190) the ancestor could not disinherit his heir by grant or other act executed in time of sickness, neither could he alien land that had descended to him, except it were for a consideration of money or service, but not to advance any younger brother without the consent of the heir."[5] In the reign of Henry III. (1216-1272), the right to alien had so far obtained a hold

be properly a fee-simple if it is either base, conditional, or qualified. It is also often used by way of contrast with fee-tail. The reader may therefore have to refer to the context in order to determine, in some cases, in which of these senses the term may be used in the following pages. *Vide* 1 Prest. Est. 429, 431; Co. Lit. 1 *b*, and note.

[1] Lit. § 360; 1 Prest. Est. 430. See 18 Am. Law Reg. 393, as to what restraints may be enforced upon the alienation of estates.

[2] 1 Spence, Eq. Jur. 137; Wright, Ten. 167; 1 W. Bl. 134; Maine, Anc. L. 230.

[3] 1 Spence, Eq. Jur. 137; Wright, Ten. 167; 1 W. Bl. 134. Mr. Thrupp, in his historical Law Tracts, informs us, that after the arrival of the Normans in England, there existed amongst them two kinds of estates, one of which they were forbidden to part with without consent of their relatives, answering to the *family estate* among the Jews. Those of the other kind were alienable at pleasure, provided the owner, by so doing, did not thereby leave his children destitute. The last were known as "acquired" or *earned* estates. p. 226.

[4] 1 Spence, Eq. Jur. 138; Wms. Real Prop. 33 and note.

[5] Bacon's Tracts, 328.

upon this kind of estate, that an ancestor might convey the lands in his possession, and thereby cut off his heirs, whether of his body or collateral, and this, whether he held them to him and his heirs or to him and the heirs of his body.[1] And although the custom of subinfeudation had become general before the time of Magna Charta (1215), lands were not freely alienable until the time of Edward I., when, by the statute *Quia Emptores*, the 18th of that reign (1290), ch. 1, every free man was at liberty to sell his lands, or any part of them, though the Magna Charta itself incidentally recognized it as an existing right.[2] [Finally, by the statute *De Mercatoribus*, 3 Edw. I. (1285), the real property of the kingdom was made liable for the debts of its owners and the subject of trade and exchange.]

§ 143. **Restrictions upon Alienation, how far valid.** — Though it is true, as already stated, that the power of free alienation is incident to an estate in fee-simple, and a condition altogether preventing alienation, in a grant of lands or devise of the same in fee-simple, would be void, as being repugnant to the estate;[3] [even if it be only for a limited time.[4] But a limited restriction, provided it be reasonable, will be upheld, and the grantee may forfeit his estate by violating it.[5]] But "no one can create what is in the intendment of the law an estate in fee, and deprive the tenant of those essential rights and privileges which the law annexes to it. He cannot make a new estate unknown to the law.[6] So, in a devise to A B and his heirs, there may be a limitation that if he fails to convey it in his lifetime, it shall go over

[1] Wms. Real Prop. 35 ; Bracton, b. 2, c. 6, fol. 17 *a*.

[2] Wms. Real Prop. 56 ; Bacon's Tracts, 330.

[3] Lit. § 360 ; 1 Prest. Est. 477 ; Blackstone Bk. *v.* Davis, 21 Pick. 42 ; Bradley *v.* Peixoto, 3 Ves. 324 ; Tud. Cas. 794 ; Hall *v.* Tufts, 18 Pick. 455.

[4] Roosevelt *v.* Thurman, 1 Johns. Ch. 220 ; Maudlebaum *v.* McDonell, 29 Mich. 78 ; Anderson *v.* Cary, 36 Ohio St. 506 ; Twitty *v.* Camp, Phil. Eq. (N. C.) 61 ; *In re* Rosher, 26 Ch. D. 801 ; Potter *v.* Couch, 141 U. S. 296 ; Green *v.* Green, 125 N. Y. 506 ; s. c. 26 N. E. Rep. 739. But see Stewart *v.* Brady, 3 Bush, 623.

[5] Lit. § 361 ; 1 Prest. Est. 478 ; Tud. Cas. 794, 795 ; McWilliams *v.* Nisly, 2 S. & R. 507, 513. See Large's Case, 2 Leon. 82 ; *Re* Macleay, L. R. 20 Eq. 186, 189. See *post*, § 943 *et seq.*

[6] Doebler's Appeal, 64 Penn. St. 917.

to another devisee named, and the limitation be a valid one.[1] But a condition restricting the right to *alien* to a single person only will be void as repugnant, since the person so selected by grantor or devisor might be one of known incapacity to purchase. And, in short, conditions as to time when, and persons to whom, alienations cannot be made, must be reasonable in order to their being valid.[2]

§ 144. **Power of devising Lands in Fee — History.** — The power of devising lands by will is of a much later origin than of conveying them by deed, except in certain localities in England. The only mode in which it could be done prior to the statute of Henry VIII., hereafter mentioned, was by means of uses. One way of doing this was by conveying them to some one to hold to such uses as the grantor should declare by his last will. And when he had made such declaration, it operated, by the interposition of chancery, to give the beneficial interest in the lands to such devisee.[3] In the words of Lord Bacon, "lands by the common law of England were not testamentary or devisable;"[4] and one reason for this was, that the alienation by will could not be consummated by livery of seisin by devisor to devisee.[5] As the statute 27 Henry VIII. united the seisin and the use in the one who was entitled to the use, its effect was to defeat the customary mode of making devises by the way of use. And there was no way of disposing of lands by will in fee from that time till the statute 32 Henry VIII. c. 1, which was explained by the statute 34 and 35 Henry VIII. c. 5, by which any person having an interest in lands held in socage might devise it by his last will to any person except a body corporate or politic.[6]

[1] Doe *v.* Glover, 1 C. B. 448. But see Ide *v.* Ide, 5 Mass. 500; and *post*, § 1770, where this subject is more fully considered.

[2] Attwater *v.* Attwater, 18 Beav. 330, overruling Doe *v.* Pearson, 6 East, 173; 1 Prest. Est. 478. The reader will observe that the conditions and restrictions above referred to are of a distinct class from those which affect the mode or purposes of occupation of estates, which belong to another part of this work.

[3] Co. Lit. 111 *b*, n. 138; Wright, Ten. 172, 173; 1 Spence, Eq. Jur. 136, 441; Bacon's Tracts, 152; Perkins, § 538; *post*, § 1337.

[4] Bacon's Tracts, 316.

[5] Co. Lit. 111 *b*, n. 138; 1 Spence, Eq. Jur. 136, 441.

[6] 1 Spence, Eq. Jur. 469; Co. Lit. 111 *b*, n. 138.

§ 145. **Fee — Transfer of the Seisin.** — [What has been said respecting the form of passing freeholds by livery, or deed, or by means of the doctrine of uses, applies to the alienation of estates in fee-simple, which are freeholds.]

§ 146. **Fee in Incorporeal Hereditaments.** — A fee-simple may be had in incorporeal as well as corporeal hereditaments, though in speaking of the one or the other, the owner is said to be seised "in his demesne as of fee" of corporeal, and "seised as of fee" of incorporeal hereditaments; the distinction being that the latter issue out of lands which belong to another than him who owns the right of way, for instance, or whatever the hereditament may be, and in such case the owner of the *easement*, as such a right would be called, has no dominion over or ownership of the land itself, though he may own the easement to himself and his heirs as fully as he could the land.[1]

§ 147. **Fee-simple — Necessity for "Heirs" in Deed.** — The origin of the use of the word "heirs" in creating an estate in fee by grant has already been explained,[2] though it has obviously become a mere arbitrary rule. Still, unless changed by statute, it is as imperative, as a rule of law, now as ever. No synonym will supply its place. Even a grant to one and "his *heir*" will give him only a life estate,[3] or to one "*or* his heirs,"[4] or to one "and his heirs during the life of another,"[5] or to one "forever," or to one "and his assigns forever;" and the words "forever," or "assigns," have no effect at this day in limiting or defining what estate is granted.[6] So to one "and his successors,"[7] or to one, his successors and assigns, is a life estate only, although coupled with a power to sell and convey a fee,[8] or to one and his "seed," or "his off-

[1] 2 Bl. Com. 106, 107.

[2] *Ante*, § 85.

[3] Co. Lit. 8 *b*; 2 Prest. Est. 8; id. 10; Com. Dig. Estate, A. 2. Though this is questioned by some authorities, see 4 Kent, Com. 6, note, and cases cited; Tud. Cas. 586; especially if "heir" can be construed to be *nomen collectivum*. Hargrave, Co. Lit. 8 *b*, n. 45.

[4] Co. Lit. 8 *b*; Com. Dig., Estate, A. 2.

[5] 1 Prest. Est. 479.

[6] 2 Bl. Com. 107; 2 Prest. Est. 3; id. 5; 1 Spence, Eq. Jur. 139; Adams *v.* Ross, 30 N. J. 505, 511.

[7] Co. Lit. 8 *b*.

[8] Sedgwick *v.* Laflin, 10 Allen, 430.

spring," or to one "and the issue of his body,"[1] or to one in "fee-simple,"[2] or to one, "his executors, administrators, and assigns."[3] No circumlocution has ever been held sufficient to create a fee.[4]

§ 148. **Apparent Exception to Foregoing Rule.** — There are what might seem at first sight exceptions to this rule. Thus, if an estate be granted clearly in fee, and the deed by which it is again granted, instead of being to the grantee and his heirs, be to him as fully as it was granted in the former deed referring to it, it is only borrowing the words of limitation from the former deed, and conveys a fee.[5]

§ 149. **"Heirs" not necessary in Trust Deeds or Legislative Grants.** — Trustees, however, take a legal estate commensurate with the equitable estate, and that only, without regard to the words of limitation used. The trustee will take whatever legal estate is necessary to enable him to carry out the trust. A grant to A and his heirs in trust for B for life would convey an estate for the life of B only.[6] Thus a grant to A B in trust to sell carries a fee.[7] So, if to A and his heirs in trust for B till he attains twenty-one years, the trustee takes a chattel interest only, and though the trust is to "heirs," if

[1] Wms. Real Prop. 120.

[2] Bridgewater *v.* Bolton, 6 Mod. 106, 109 ; 2 Prest. Est. 5 ; Trusdell *v.* Lehman, 47 N. J. Eq. 218 ; s. c. 20 Atl. Rep. 391 ; Wilder *v.* Wheeler, 60 N. H. 351 ; Oyster *v.* Knull, 137 Pa. St. 448 ; s. c. 20 Atl. Rep. 624. But equity will give effect to the grantor's intention to convey a fee-simple where the necessary words of limitation have been omitted. Vickers *v.* Leigh, 104 N. C. 248 ; s. c. 10 S. E. Rep. 308.

[3] Clearwater *v.* Rose, 1 Blackf. 137. In the case of Foster *v.* Joice, 3 Wash. C. C. 498, the deed was "to J. M. and his generation to endure so long as the waters of the Delaware run," and held to be a life estate only. But in Vermont a lease for one thousand years, or as long as wood grows and water runs, was held to be a fee. Arms *v.* Burt, 1 Vt. 303 ; Stevens *v.* Dewing, 2 Vt. 411.

[4] Adams *v.* Ross. 30 N. J. 512.

[5] Com. Dig., Estate, A. 2, n. ; Shep. Touch. 101 ; 2 Prest. Est. 2.

[6] Newhall *v.* Wheeler, 7 Mass. 189 ; White *v.* Woodberry, 9 Pick. 136 ; Fisher *v.* Fields, 10 Johns. 495, 505 ; *post*, § 1454 ; Jenkins *v.* Young, Cro. Car. 230 ; North *v.* Philbrook, 34 Me. 532, 537 ; 1 Sand. Uses, 107 ; Gould *v.* Lamb, 11 Met. 84 ; Brooks *v.* Jones, ib. 191 ; Tiff. & Bul. Trust. 788 *et seq.* ; Hill, Trust. 239 ; Tud. Cas. 459. But see Jackson *v.* Myers, 3 Johns. 388, 396 ; Sears *v.* Russell, 8 Gray, 86 ; Koenig's Appeal, 57 Penn. St. 352, 355 ; Doe *v.* Considine, 6 Wall. 458, 471 ; 2 Jarm. Wills, 156.

[7] Angell *v.* Rosenbury, 12 Mich. 241, 266 ; Sears *v.* Russell, 8 Gray, 86.

the trustee dies, his executor is to execute the trust, and not his heirs.[1] Legislative grants may convey lands without making use of technical words required in a deed.[2]

§ 150. **"Right Heirs."** — A limitation to one and his "right heirs" is the same as to his "heirs" simply; and a limitation directly to the "right heirs" of one carries a fee without adding the words "and their heirs."[3]

§ 151. **"Heirs" not required in Deeds of Release — Exception.** — There may, too, be such a joint interest in the fee in lands between two persons, that if one simply releases to the other without words of inheritance, the latter becomes owner in fee of the entire estate; as if a parcener or joint tenant releases to his co-parcener or co-tenant, he extinguishes his own right, leaving the other the sole owner. So if a disseisee release to his disseisor;[4] so if one have a right in fee out of lands owned by another in fee, like a right of way, and he release to the latter.[5] [But a remainder-man or reversioner in fee, releasing to the particular tenant without words of inheritance, would give him no more than a life estate.[6]]

§ 152. **"Heirs" required in Partition Deeds.** — And where tenants in common have partition made of their estate by act of law, each is in, in the part set off to him, in severalty, of the same estate as he had in his undivided share before. But if they make partition by deeds of mutual grant and release, nothing more than a life estate in severalty would pass thereby without words of inheritance.[7]

§ 153. **"Heirs" not necessary in Deeds to Corporations.** — If lands are conveyed to a corporation aggregate, it will, from the nature of such corporations, be understood as a fee without any words of limitation.[8] But if it be to a corporation

[1] 2 Law Mag. 82; Doe *v.* Considine, 6 Wall. 470.

[2] Rutherford *v.* Greene, 2 Wheat. 196.

[3] Co. Lit. 10 *a*, 22 *b*; Com. Dig., Estate, A. 2; 1 Rolle, Abr. "Estate," L. 8; 4 Cruise, 276.

[4] Com. Dig., Estate, A. 2; Lit. §§ 519, 520.

[5] 2 Prest. Est. 58.

[6] 2 Prest. Est. 62.

[7] 2 Prest. Est. 56, 58. The reasons for the difference in this respect between tenants in common and joint tenants will appear hereafter.

[8] Wilcox *v.* Wheeler, 47 N. H. 488.

sole, it must be limited to such corporator and his "successors," which in case of corporations answers to "heirs" in case of grants to natural persons, or it would be only an estate during the life of such corporator.[1]

§ 154. **"Heirs" not necessary in Will — Intention governs.** — But in the case of a devise, the intention of the testator, if clearly expressed by his last will, will be sufficient to create a fee without the use of the word "heirs."[2] Among the illustrations may be mentioned a devise of one's *estate* in such lands, and he owns a fee,[3] or "all" his "right,"[4] or "all" his "property," or "all" his "inheritance,"[5] or to one "in fee-simple."[6] So if it is necessary, in order to give effect to a charge or trust created by the same will, to hold the devise a fee, it will be so held.[7]

§ 155. **Devise — Fee inferred from Nature of Use.** — So a fee may be inferred from the nature of the use which devisee is to make of the land; as, a devise of wild lands to one, without any words of inheritance, will be construed to be a fee because a mere tenant for life could make no use of such land. The very using of it by cutting off its timber would work a forfeiture.[8]

§ 156. **Devise — Fee inferred from Charge.** — And upon the same principle, if lands are given to one by will, who is by the same will personally charged with the payment of money on account of such devise, it will be held to be a fee, for the testator intended to make him the object of his bounty; and if he only takes a life estate, he might die the day after paying the money, and so lose the whole benefit of the devise.[9]

[1] Ang. & Am. Corp. ch. v. § 1; Overseers *v.* Sears, 22 Pick. 122, 126; Com. Dig., Estate, A. 2; 2 Prest. Est. 43; id. 7; Wilcox *v.* Wheeler, 47 N. H. 488.

[2] Jarm. Wills, c. 34, p. 229, 1st ed.; Tud. Cas. 588.

[3] 2 Bl. Com. 108; Bridgewater *v.* Bolton, 6 Mod. 106, 109; Godfrey *v.* Humphrey, 18 Pick. 537.

[4] Newkerk *v.* Newkerk, 2 Caines, 345.

[5] Jackson *v.* Housell, 17 Johns. 281; Wms. Real Prop. 189.

[6] Bridgewater *v.* Bolton, 6 Mod. 106, 109.

[7] Baker *v.* Bridge, 12 Pick. 27; Wait *v.* Belding, 24 Pick. 129, 138; Godfrey *v.* Humphrey, 18 Pick. 537.

[8] Sargent *v.* Towne, 10 Mass. 303.

[9] 2 Bl. Com. 108, n.; Doe *v.* Richards, 3 T. R. 356; Jackson *v.* Merrill, 6 Johns. 185; Lithgow *v.* Kavenagh, 9 Mass. 161; Wait *v.* Belding, 24 Pick. 139.

But if the payment is charged upon the lands only, and not upon the devisee personally, the rule does not apply.[1]

§ 157. **Devise of Fee — Statutory Enlargement.** — To obviate any question in cases like the foregoing, there is now a provision in the English statutes as well as in those of many, if not all the States, whereby a devise of land carries whatever estate the devisor had in them, unless the same is restricted or qualified by the language of the will.[2]

§ 158. **Curtesy and Dower Incidents of Fee-simple.** — Among the incidents other than the right of alienation belonging to estates in fee-simple at the common law, are curtesy and dower; the one being the right which a husband has in the estate of his wife, if he survive her, the other the right which a wife has in the husband's lands if she survive him, which will be explained in their proper places.[3]

§ 159. **Inheritable Quality of Fee-simple.** — Another incident is, that if not aliened by deed or last will of the owner, estates in fee-simple descend without restriction to his legal heir or heirs, and this, whether the estate be corporeal or incorporeal, in possession, reversion, or remainder, and whether vested or contingent.[4]

§ 160. **Fee-simple subject to Owner's Debts.** — Lands held in fee-simple are also subject to the debts of the owner, both in England and this country, and as well after his death as while living. This was not an original incident to lands so held.[5] And if lands descend to the heir or go to a devisee, he holds them subject to be taken for the payment of the debts of the ancestor, according to the laws of the State in which they are situate.[6]

§ 161. **Common-law Rule — No Estate after a Fee-simple.** — From the definitions heretofore given, it would seem to fol-

[1] Jackson *v.* Bull, 10 Johns. 148.

[2] 7 Wm. IV. and 1 Vict. c. 26, § 28. See *ante*, § 85.

[3] Tud. Cas. 594. The law as to dower has been materially altered by statute in England and in several of the States, as will be shown hereafter.

[4] Tud. Cas. 594. The rules of descent depend upon the local statutes of the several States, and come under another head of this work.

[5] 1 Spence, Eq. Jur. 173, 174. See *post*, § 2045.

[6] Watkins *v.* Holman, 16 Pet. 25, 63; 1 Greenl. Cruise, 60, n.; Wyman *v.* Brigden, 4 Mass. 150.

low that no estate could be limited to take effect after a fee-simple, as that in its nature is indeterminable. But it will be seen that, under the doctrine of uses and executory devises, this is often done by making a fee-simple determinable upon the happening of some event, and substituting a new estate in its stead.[1]

§ 162. **Estates of possibly Perpetual Duration are Fees.** — As every estate which may be of perpetual continuance is deemed to be a fee, and may come within the definition of Lord Coke, of a fee-simple absolute, conditional, qualified, or base fee,[2] this seems to be a proper connection in which to treat of them.

§ 163. **Restricting the Inheritance of Fees.** — [In creating an estate of inheritance, other than an estate tail, the inheritance cannot be restricted to a particular class of heirs.] Thus an estate to one and his "heirs male," or "heirs female," would be regarded as a fee-simple, the limitation to the particular class of heirs being regarded as surplusage.[3]

§ 164. [**Base, Qualified, or Determinable Fees** comprise, in a restricted sense, those estates, creatable for the most part only after the statute of uses, which were liable to come to an end, another fee being substituted.[4]] These terms embrace all fees which are liable to be determined by some act or event expressed in their limitation to circumscribe their continuance, or inferred by law as bounding their extent.[5] [The contingency which is to terminate such an estate is called a limitation.[6]]

§ 165. **Conditional Limitations.** — The estate itself is now denominated "a conditional limitation," as distinguished from an estate upon condition, the estate in one case determining *ipso facto* by the happening of the event by which its limitation is measured; in the other, though liable to be

[1] Com. Dig. (Day's ed.) Estate, A. 4, and note; Co. Lit. 18 *a*; 2 Law Mag. 82.

[2] Prest. Est. 480; Co. Lit. 1 *b*; 2 Flint. Real Prop. 137. Judge Kent uses *qualified*, *base*, and *determinable* fees indiscriminately. 4 Kent, Com. 9.

[3] Lit. § 31; Com. Dig., Estate, A. 6; 1 Prest. Est. 472; id. 461; Co. Lit. 27; id. 130; 2 Law Mag. 68; id. 260.

[4] 2 Flint. Real Prop. 136; 2 Bl. Com. 109; 1 Spence, Eq. Jur. 144; 1 Prest. Conv. 299.

[5] 1 Prest. Est. 466; id. 431; Seymour's Case, 10 Rep. 97.

[6] Walsingham's Case, Plowd. 557.

defeated, not being in fact determined until he who has a right to avail himself of the condition enters and determines the estate.[1]

§ 166. **Estates upon Condition Subsequent.** — [An estate upon condition must not be confounded with "a fee conditional at common law," an estate which by the statute *De Donis* was converted into an estate tail.[2]] But, in its broader sense, a determinable or qualified fee may embrace what is properly a fee upon condition.[3]

§ 167. **Determinable Fee — Illustrations.** — Among the instances put by way of illustrating a determinable fee, is a limitation to one and his heirs, peers of the realm or lords of the manor of Dale, or so long as a certain tree stands, or until the marriage of a certain person, or till a man shall go to or return from Rome, or till certain debts are paid, or so long as A or his heirs shall pay B a certain sum per annum, or so long as St. Paul's shall stand, or until a prescribed act shall be done, or until a minor shall attain the age of twenty-one years, and the like.[4] So a grant to a canal corporation, "as long as used for a canal," was held to be a qualified fee.[5] But a limitation to A and his heirs, during the widowhood of B, or while C resides at Rome, would only be a life estate and not a fee, because it is measured by the life of a person *in esse*.[6]

§ 168. **Determinable Fee — Rights of Tenant.** — So long as the estate in fee remains, the owner in possession has all the rights in respect to it which he would have if tenant in fee-simple, unless it be so limited that there is properly a reversionary right in another, something more than a possibility of reverter belonging to a third person, when,[7] perhaps, chancery might interpose to prevent waste of the premises.[8]

[1] Brattle Sq. Church *v.* Grant, 3 Gray, 142, 146, 147; 1 Prest. Est. 475.

[2] 2 Bl. Com. 110; 2 Prest. Est. 289; 1 Prest. Abs. 378; see *post*, § 175 *et seq.*

[3] 1 Prest. Est. 475.

[4] 1 Prest. Est. 442; id. 432; Com. Dig. (Day's ed.) Estate, A. 6, n.; Cook *v.* Bisbee, 18 Pick. 529; Tud. Cas. 605.

[5] State *v.* Brown, 27 N. J. 20.

[6] 1 Prest. Est. 442; McKelway *v.* Seymour, 29 N. J. 329; State *v.* Brown, 27 N. J. 13, 20.

[7] Plowd. 557; Smith, Real & Pers. Prop. 103; 1 Cruise, Dig. 65; 1 Atkinson, Conv. 183.

[8] This remark should not be understood as intending to embrace estates tail. Tud. Cas. 613.

§ 169. **Reversion after Determinable Fee.** — An estate to one and his heirs, so long as a tree stands, would be one of those where there is a reversion, because the law contemplates as certain the destruction of the tree at some future time, and, therefore, that there will certainly be an estate in some one other than the tenant and those holding under him, after the happening of that event.[1]

§ 170. **Possibility after Determinable Fee.** — On the other hand, if it be to A and his heirs till B comes back from Rome, the right to have it when he comes back is not a reversion but a mere *possibility;* he may and may not come back, and if he were to die before he came back, the estate would become absolute in the grantee.[2]

§ 171. **Inheritance of Determinable Fee.** — A fee determinable will descend in the line of succession of the purchaser, and will determine upon the happening of the event upon which it was first limited, into whosesoever hands it may have come.[3] And the same rule applies in cases of estates upon condition; they are liable to be defeated by a breach thereof, in the same manner as they would have been in the hands of the original grantee as long as the condition may affect them.[4]

§ 172. **Determinable Estate may become absolute.** — These estates often may become fee-simple absolute by uniting them with the reversionary or possible interest in the inheritance, which would arise or come into possession if they were to determine, or by extinguishing such a possibility. Thus in the case of an estate to A and his heirs so long as he has heirs of his body, where if he dies without issue his estate determines, being a determinable fee. But if the one who has this contingent reversionary right or possibility release it to the tenant in possession, it would change his fee determinable into a fee-simple absolute.[5] If it had been to A and his heirs till B returned from Rome, and B had died at Rome,

[1] 1 Prest. Est. 440 ; Ayres *v.* Falkland, 1 Ld. Raym. 326.
[2] 1 Prest. Est. 441; id. 440; 1 Atk. Conv. 183.
[3] 1 Prest. Est. 440 ; Tud. Cas. 606.
[4] 1 Prest. Est. 475; 1 Atk. Conv. 183 ; 1 Prest. Abs. 378.
[5] Walsingham's Case, Plowd. 557; 1 Prest. Est. 482.

the estate in A would have become absolute at once. The event in such case is not a condition but a limitation, — the estate is to endure until he returns.[1] So if the estate be expressly one upon condition, and the condition be performed, the condition is gone and the estate is thereby absolute.[2]

[1] 1 Prest. Est. 440–442 ; Tud. Cas. 606.
[2] 1 Prest. Est. 476; 1 Atk. Conv. 183.

CHAPTER IV.

ESTATES TAIL.

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§ 173. **Early Existence.** — [Estates tail were in use among the Saxons prior to the time of Alfred, and were an adaptation of the Roman *fidei commissa.*[1]] The custom of conveying lands to a man, or a man and his wife, and the issue of a particular marriage, or to a man and the heirs of his body, or some particular class of issue, or heirs, was continued after the Conquest.[2] Such a fee or feud was called a *feudum talliatum*, from *tailler*, to cut or mutilate.[3]

§ 174. **Fee conditional at Common Law.** — Where an estate was given in such a form, it was held to be a conditional fee, that is, if the donee should not have heirs or issue according to the prescribed description, the land should revert to the donor; but if the condition was performed by the birth of such heirs presumptive, or issue, the donee was held to have a fee-simple, so far that he might charge or alien the land as a fee-simple estate.[4] Such was the case up to the time of Edward I. These were called fees-simple conditional. But though liable to be changed into fees absolute in the manner above stated, if they descended to the issue, and the issue became extinct before alienation made, they reverted to the donor.[5]

§ 175. **Statute De Donis Conditionalibus.** — Previous to this time, too, the nobility and great landed proprietors, in order

[1] 1 Spence, Eq. Jur. 21 ; Barringt. Stat. 113.

[2] 1 Spence, Eq. Jur. 140.

[3] 2 Bl. Com. 112, n.

[4] 1 Spence, Eq. Jur. 141 ; Co. 2d Inst. 333; Tud. Cas. 607 ; Co. Lit. 19 *a* ; 2 Bl. Com. 111. Lord Mansfield said: "I cannot agree with the argument that on the performance of the condition by birth of a child, the estate becomes absolute. It was so by a subtlety in odium of perpetuity and for the special purpose of alienation, but for no other. It otherwise reverted to the donor, on failure of the issue, according to the original restriction." Buckworth *v.* Thirkell, 3 B. & P. 652, n.; Ford *v.* Flint, 40 Vt. 382, 392 ; Finch, 121, 122. "But if the issue fail before the alienation, the donor or giver shall have it."

[5] 1 Spence, Eq. Jur. 141 ; Co. Lit. 19 *a*, and note 110 ; 2d Inst. 332.

to preserve their lands within their own families, had been accustomed to settle them upon their oldest sons and their issue, and, upon the failure of such issue, upon the second sons and their issue, by way of remainder, and so on, with restrictions against alienation. But the adoption of the doctrine of conditional fees tended to defeat this intended entailment, and caused the barons to appeal to Edward I. to restore the ancient law of Alfred for the preservation of entails.[1] This led to the enactment of the famous statute *De Donis Conditionalibus* (13 Edw. I. Stat. 1, c. 1, § 2).

§ 176. **How Fees conditional arose.** — In tracing the history of the descent of estates, we find that children first succeeded to the feud in place of their fathers, and grandchildren in the place of children. If no children, brothers might succeed to brothers, if the feud was an *ancient* one. The admission of collateral relations of the blood of the first feudatory was the last step in the law of descent.[2] "Heirs," therefore, as at first used, meant the issue of the tenant or vassal, to the exclusion of all collateral relations. But by the time of Henry II., collateral kindred had been admitted as heirs, and if a donor wished to confine the inheritance to the offspring of the donee, he was obliged to limit it expressly to him and the heirs of his body.[3] This was construed a conditional fee.

§ 177. **Frank Marriage.** — And there was one other conditional estate of inheritance which is referred to in the statute, and that was *frank marriage*, which applied to a case where a father or kinsman, upon a person marrying his daughter or cousin, gave them lands, and it was understood to be upon the condition that these were to descend to the issue of such marriage, if any. If the donees had issue, the condition was considered as having been performed, and the estate thereby became alienable.[4]

§ 178. **Terms of Statute De Donis.** — The statute *De Donis* recites, by way of preamble, the custom of giving land to a man and his wife and to the heirs begotten of their bodies, with an express condition of reverter upon the failure of such

[1] 1 Spence, Eq. Jur. 141.
[2] Wright, Ten. 16–18; 2 Bl. Com. 220–222.
[3] 2 Bl. Com. 221; Wms. Real Prop. 31, 32.
[4] 1 Cruise, Dig. 71.

heirs. Also the custom of giving lands in frank marriage, and of giving land to another and the heirs of his body. It then recites the custom above referred to, of aliening lands after issue born, "to disinherit their issue of the land contrary to the minds of the givers, and *contra formam in dono expressam.*" It then declares, in substance, that the will of the giver, according to the form in the deed of gift manifestly expressed (*secundum formam in charta doni sui*), should from henceforth be observed, so that, among other things, they to whom the land was given should have no power to alien it, but it should remain unto the issue of them to whom it was given after their death, or should revert unto the giver or his heirs, if issue fail, etc.[1]

§ 179. **Effect of the Statute.** — The effect of this was, to divide the entire inheritance into two parts or estates, namely, the estate tail and the reversion or remainder in fee expectant upon the failure of the estate tail.[2]

§ 180. **Statute embraces Incorporeal Hereditaments.** — In translating this statute from the Latin, the word *lands* is used for the original *tenementum*, which embraces not only corporeal hereditaments, but incorporeal also, which issue out of or are annexed to those that are corporeal, such as rents, estovers, and commons.[3]

§ 181. **Personalty not within the Statute.** — But an ownership merely personal, or such as is to be exercised about chattels, cannot be the subject of entailment.[4]

§ 182. **Statute remedial.** — The statute *De Donis* was regarded by the courts as a remedial one, and instead of confining it to the precise cases enumerated in it, they regarded these as put by way of example. And the effect of it was to introduce a new class of estates or give a different quality to an old one.[5]

§ 183. **Statute developed.** — The statute, in its several bearings, was slowly developed, and it was not until the time of Edward III. that it was settled that an estate limited to

[1] 2d Inst. 332, 333; 2 Prest. Est. 378.
[2] Atk. Conv. 194.
[3] 2 Bl. Com. 113; Co. Lit. 19 *b*.
[4] 2 Bl. Com. 113; Co. Lit. 20 *a*, and note 120.
[5] 2 Prest. Est. 380; id. 453; 2 Bl. Com. 113.

one and the heirs male of his body would be confined in its descent to males alone. And it was long doubted whether an entailment to heirs female could keep the succession in the line of females tracing descent through females.[1]

§ 184. **Barring Entails.** — [These entailments were fraught with many evils, which are enumerated by Sir William Blackstone.[2] All attempts to change the law were, however, successfully resisted for two hundred years, when, by a contrivance of the courts and a bold measure of judicial legislation, the tenant was enabled to change his fee-tail into a fee-simple.[3]]

§ 185. **Fines.** — This was accomplished, to a limited extent, by means of levying fines, but fully and completely by means of common recoveries. These were borrowed from the "*cessio in jure*" of the Roman law.[4] These, though now abolished in England by the statutes 3 & 4 Wm. IV. c. 74, and, so far as fines are concerned, having prevailed in this country in but very few of the States, and as to recoveries to a certain extent only, have played too important a part for centuries, in English conveyancing, to be passed over unnoticed. Fines consisted of a suit brought between actually litigating parties, where, by permission of the court, they entered a final agreement, *finalis concordia*, upon the record, which was binding upon them like any judgment of court. When applied to bar entails, the person to whom the land was to be conveyed, acting in collusion with the tenant, brought a feigned action against him for the land. The *finalis concordia* was thereupon entered into between them, for form, and became a matter of record, whereby the claimant's right to the land was admitted and established. The statute *De Donis* declared that such fines should not bar entails. But one passed 4 Hen. VII., and one in 32 Hen. VIII., allowed them to bar heirs claiming under the entail.[5]

[1] 2 Prest. Est. 453.

[2] 2 Bl. Com. 116.

[3] Taltarum's Case, Year Book, 12 Edw. IV. 19; 2 Bl. Com. 116; Wms. Real Prop. 39; 2 Prest. Est. 454; Tud. Cas. 608; 10 Rep. 37 *a*. This was done, says Spence, by the judges in the reign of Edw. IV., "in the exercise of their Pretorian authority." 1 Spence, Eq. Jur. 143.

[4] Maine, Anc. L. 289; Gaius, C. I. § 134, n.; C. II. § 24.

[5] 1 Spence, Eq. Jur. 143; 2 Flint. Real Prop. 673; Shelf. R. P. Stat. 375;

§ 186. **Common Recoveries.** — The process above described was called "levying a fine," and was much in use in barring adverse claims by "non claim," as it was called. But the mode of barring estates tail which came into use after Taltarum's Case (12 Edw. IV. A. D. 1472), and the only effectual mode, was a common recovery.[1] This was a fictitious suit brought in the name of the person who was to purchase the estate, against the tenant in tail who was willing to convey. The tenant, instead of resisting this claim himself, under the pretence that he had acquired his title of some third person who had warranted it, vouched in, or, by a process from the court, called his third person, technically the *vouchee*, to come in and defend the title. The vouchee came in as one of the *dramatis personæ* of this judicial farce, and then without saying a word disappeared and was defaulted. It was a principle of the feudal law adopted thence by the common law, that if a man conveyed lands with a warranty, and the grantee lost his estate by eviction by one having a better title, he should give his warrantee lands of equal value by way of recompense. And as it would be too barefaced to cut off the rights of reversion as well as of the issue in tail, by a judgment between the tenant and a stranger, it was gravely adjudged, 1st, that the claimant should have the land as having the better title to it; and 2d, that the tenant should have judgment against his vouchee to recover lands of equal value on the ground that he was warrantor, and thus, theoretically, nobody was harmed. If the issue in tail or the reversioner, or remainder-man, lost that specific estate, he was to have one of equal value through this judgment in favor of the tenant in tail, whereas in fact the vouchee was an irresponsible man, and it was never expected that he was anything more than a *dummy* in the game.[2] The result of this, which Black-

Tud. Cas. 689. A case of the levy of a fine occurred in New York in 1827. Fines were abolished there in 1830. McGregor *v.* Comstock, 17 N. Y. 162. Fines and recoveries were abolished in New Jersey in 1799, Croxall *v.* Shererd, 5 Wall. 268; but fines were in force in Pennsylvania in 1837, 4 Kent, Com. 497, note; Richman *v.* Lippincott, 29 N. J. 44. They never were known in Missouri. Moreau *v.* Detchemendy, 18 Mo. 527.

[1] Wms. Real Prop. 39; 2 Bl. Com. 271; 1 Spence, Eq. Jur. 144, n.; Tud. Cas. 607.

[2] 2 Flint. Real Prop. 673, 674; 1 Spence, Eq. Jur. 143.

stone calls "a kind of *pia fraus* to elude the statute *De Donis*,"[1] was that the lands passed from the tenant in tail to the claimant in fee-simple, free from the claims of reversioner, remainder-man, or issue in tail, and he either paid the tenant for it as a purchaser, or conveyed it back to him again in fee-simple.[2]

§ 187. **Effect of Common Recovery.** — A common recovery by a tenant in tail has the effect to bar his estate tail and all remainders over and the reversion depending on that estate, and all conditions and collateral limitations annexed to the same estate.[3] And it is held that an executory devise may be destroyed by a common recovery suffered by the tenant in tail, which enlarges his estate into a fee, and excludes all subsequent limitations, whether in remainder or by way of springing use or executory devise.[4] So a recovery suffered by a tenant for life will cut off a contingent, but not a vested remainder.[5]

§ 188. **Conditions against barring Entails.** — The right thus acquired of barring them seems to have become, in the theory of the law, an inherent, inseparable incident to estates tail, so that any attempt to restrain the exercise of it by the tenant, by covenant or condition, was futile, as such restraint was held to be void.[6]

§ 189. **Estates Tail in the United States.** — In this country, estates tail, as a distinctive class, are abolished in many of the States. In others, where they are still retained, they may be barred, usually, by a simple deed by the tenant.[7]

§ 190. **Descent.** — Estates tail, then, are estates of inheritance, which, instead of descending to heirs generally, go to the heirs of the donee's body, which means his lawful issue, his children, and through them to his grandchildren in a direct line, so long as his posterity endures in a regular order

[1] 2 Bl. Com. 117.

[2] 1 Spence, Eq. Jur. 144. Taltarum's Case is reported in Year Book, 12 Edw. IV. 19, and is translated into English in Tud. Cas. 562.

[3] 2 Prest. Est. 460; Pigott, Recoveries, 21; Page *v.* Hayward, 2 Salk. 570.

[4] Taylor *v.* Taylor, 63 Penn. St. 481.

[5] Doe *v.* Gatacre, 5 Bing. N. C. 609.

[6] Co. Lit. 379 *b*, n. 300; 1 Spence, Eq. Jur. 144, n.

[7] Wms. Real Prop. 45, 46.

and course of descent, and, upon the extinction of such issue, the estate determines.[1] A devise to one's sons, and, in case any one of them dies unmarried or without issue, his share to be divided among the survivors, creates an estate tail in each son, with remainders over to the survivors.[2] So where the devise was to a daughter, but if she died without heirs, then to go to her brother, it was held to mean heirs of her body, because if to her heirs generally, her brother would be one of these, and take by descent.[3]

§ 191. **Terminology — "Heirs of the Body."** — The one who makes the estate is called the *donor;* he to whom it is made the *donee.* In order to create an estate tail there must be a limitation in express terms or by direct reference not only to *heirs*, but to heirs of the donee's body. [But it is otherwise when the estate is created by will.[4]]

§ 192. **Estate Tail by Construction.** — An instance of an estate tail by construction, where there is no direct limitation to the heirs of the donee's body, would be an estate to A, with a proviso that if he shall die without heirs of his body, the estate shall revert to the donor or go over to one in remainder. Here, it will be perceived, there was no direct limitation to the heirs of A, and it is too plain for doubt that the donor intended the heirs of his body should take it at his decease, for he gives it over, or reserves it, in case he has no such heirs, and only in that contingency.[5]

§ 193. **Fee-Tail and Fee determinable differentiated.** — But if the gift be to A and his heirs, so long as he, or some other person named, has heirs of his body, it is a fee-simple determinable, and not an estate tail. The heirs who may take are unlimited, but the duration of their estate is measured by the length of time that the line of succession of heirs of the donee's body, or of the other person named, may last.[6] [This would be true, however, only in case there is no limitation over; for if it were by way of conditional

[1] 2 Prest. Est. 360, 374; 1 id. 451; Wms. Real Prop. 30.
[2] Matlack *v.* Roberts, 54 Penn. St. 148; Allen *v.* Trustees, 102 Mass. 262.
[3] Fahrney *v.* Holsinger, 65 Penn. St. 388; Shutt *v.* Rambo, 57 Penn. St. 149.
[4] 1 Prest. Est. 451; 2 Prest. Est. 397, 398.
[5] Perkins, § 173; Allen *v.* Trustees, 102 Mass. 262.
[6] 2 Prest. Est. 258–360; id. 361; 2 Bl. Com. 113.

limitation, the limitation over, being of a contingent estate, would offend against the *rule against perpetuities*, and would be void, leaving a fee-simple absolute in the first taker.]

§ 194. **Subsequent Clause reducing Fee-simple to Fee-tail.** — And a deed to A and his heirs of lands, to have and to hold (*habendum*), to the heirs of his body, limits and qualifies the estate otherwise a fee-simple, and reduces it to an estate tail, defining in effect in the second clause what was meant by "heirs" in the first.[1] So a limitation to A B and his heirs, and if he die without issue of his body, then remainder over to some other person, it would by this clause, as to issue of his body, be understood as restricting the general word *heirs* to heirs or issue of the donee's body.[2]

§ 195. **Estate Tail in Præsenti, Fee-simple in Expectancy.** — On the other hand, if the first grant had been to A and the heirs of his body, with the *habendum* to A and his heirs, without any terms of restriction, the courts, in order to give effect to both clauses, if possible, would hold that he first creates an estate tail, and that so long as he has issue to take they will take as tenants in tail. But if at any time such line of issue fail, then the estate would go to his heirs generally, so that he is said to take an estate tail *in præsenti*, with an estate in fee-simple in expectancy.[3]

§ 196. **Fee-tail may be defeasible.** — [Fees-tail, like fees-simple, may be so limited as to be defeated or become defeasible upon the happening of a certain event.[4]]

§ 197. **No Entails of Chattel Interests.** — An estate tail is one of inheritance, and therefore cannot exist in respect to a mere freehold estate for life or in a chattel interest. And a limitation in terms which would create an estate tail if applied to real estate would vest the whole interest absolutely in the first taker if employed as to chattels or chattel

[1] 2 Prest. Est. 509 ; Altham's Case, 8 Rep. 154 *b*.

[2] Per Ld. Holt, Idle *v.* Cooke, 2 Ld. Raym. 1152 ; Brice *v.* Smith, Willes, 1 ; Hulburt *v.* Emerson, 16 Mass. 241 ; 2 Prest. Est. 519 ; Hayward *v.* Howe, 12 Gray, 49; Gifford *v.* Choate, 100 Mass. 343, 345.

[3] Perkins, § 168 ; Co. Lit. 21 *a* ; Altham's Case, 8 Rep. 154 *b* ; Corbin *v.* Healy, 20 Pick. 514.

[4] 2 Prest. Est. 362 ; id. 446.

interests in lands, because the statute *De Donis* applies only to lands and tenements.[1]

§ 198. **Heirs in Tail take by Descent.** — In all cases where the heirs of a donee in tail take the estate, they do so by descent and not by purchase. But the heirs in such case do not claim the estate as coming from their ancestor as its source, but as an estate coming through him as special heir, which he cannot intercept except in the mode provided by law.[2] But if the limitation were to the heirs of the body of A, whoever answers to that description would take as purchasers, and the estate would then descend to the same issue and in the same order of succession as if the estate had been limited to A and the heirs of his body.[3]

§ 199. **Limitation of Estates Tail.** — It is requisite, in order to create such an estate, that, in addition to the word "heirs," there should be words of procreation which indicate the body from which these heirs are to proceed, or the person by whom begotten. If this is done, it may not be necessary to make use of the words "of the body," if, by the description, it appears that they are to be the issue of a particular person.[4] A general limitation to a man and the heirs of his body is sufficient, it being immaterial of whom begotten.[5] Whether the limitation be to one and the heirs of his body begotten, or to such heirs to be begotten, is immaterial, for in the former case it would extend to children born after the gift, and in the latter would embrace those already born.[6]

§ 200. **Estates Tail general, special.** — The estates thus far spoken of are estates tail general, — limited to a man and the heirs of his body without any further specification. There

[1] 2 Bl. Com. 113; Whitmore *v.* Weld, 1 Vern. 326 and 343, n.; Co. Lit. 20 *a*, and n. 120; Child *v.* Baylie, Cro. Jac. 461: Atkinson *v.* Hutchinson, 3 P. Wms. 258; 2 Jarm. Wills, 489, and Perkins's note; Britton *v.* Twining, 3 Mer. 176, 183; Stockton *v.* Martin, 2 Bay, 471; Wms. Ex. 565; id. 949; *ante*, § 180; Albee *v.* Carpenter, 12 Cush. 382. But see Forth *v.* Chapman, 1 P. Wms. 663; Hall *v.* Priest, 6 Gray, 18, 22, that a different construction may be given to the words "leaving no issue."

[2] Perry *v.* Kline, 12 Cush. 127.

[3] 2 Prest. Est. 360; id. 375.

[4] 2 Prest. Est. 478; Co. Lit. 20 *b*; 2 Bl. Com. 115.

[5] 2 Prest. Est. 412.

[6] 2 Prest. Est. 449, 450.

are also estates tail special, — limited to a particular class of the heirs of the body of the donee, as to those begotten on his wife Mary, and the like. So it may be to the heirs male or female of the body of the donee, making an estate tail male or an estate tail female. Such limitations as these confine the inheritance to the special issue prescribed, and none other can succeed to it. Thus, if the estate be limited to a man and the heirs of his body by his first wife, and she die without issue, no issue by any other wife could claim the inheritance.[1] If, for instance, the gift be to A and the heirs of his body, on his wife Mary begotten, it presupposes that he then has a wife of that name. And if such is not the case, the gift would fail. But if it be to A and the heirs of the body of B his wife, who is dead, it is an estate tail, if there are any issue of that wife living when the gift is made. But if there are no such issue living, instead of his becoming tenant in tail, he is merely tenant for his own life. He is not even tenant in tail after possibility of issue extinct, which will be hereafter explained.[2]

§ 201. **There must be Possibility of Lawful Issue.** — In order to have a limitation in special tail good where the issue is to be begotten of some woman named, she must either be the donee's wife or one who by possibility may become such. If, for instance, she was so near akin to the donee as to render it unlawful for them to marry, the estate would be in him only for life.[3]

§ 202. **Present Impossibility of Marriage immaterial.** — The present impossibility of the donee marrying the woman named is immaterial if there be a future possibility of such event. Thus, the woman may be the wife of another; but he may die and she may marry the donee. Nor does the law regard the physical impossibility of offspring; for although the woman be a hundred years old, it would not be an estate tail after possibility of issue extinct as long as the parties are alive.[4]

§ 203. **Entails Male or Female.** — Where the limitation is

[1] 2 Bl. Com. 113, 114; 1 Spence, Eq. Jur. 141; 2 Prest. Est. 413, 414, 420.
[2] 2 Prest. Est. 414; Co. Lit. 27 *a*, n. 155.
[3] 2 Prest. Est. 417.
[4] Id. 395.

to one and the heirs male, or to him and the heirs female of his body, it confines the inheritance to the one line and excludes the other from the succession. So that whoever claims by descent must be able to trace his or her line back to the donee through males altogether or females altogether.[1]

§ 204. **Necessary Words of Limitation.** — In regard to making use of proper technical terms in creating estates tail by deed and by will, the same rules of strictness or latitude apply as in the matter of estates in fee-simple. Thus a grant to a man and his heirs male, by deed, would be construed to create a fee-simple for want of the requisite words, "of his body," or their equivalent. But if it had been by will, the law, to carry out the testator's intention, would supply these words and regard it a fee-tail.[2]

§ 205. **Words equivalent to "of the Body."** — Among the illustrations given of estates tail having been created by deed without the use of the words, "of the body," but with words regarded as equivalent, are, to A and his heirs, namely, the heirs of his body ; or of himself lawfully issuing or begotten; or of his flesh, or of his wife, begotten; or which he shall happen to have or beget.[3]

§ 206. **"Heirs" omitted, Estate is for Life.** — And yet if the word "heirs" is wanting, the estate is only one for life, though terms of entailment even stronger than those above mentioned were used. Thus a grant to A and his issue of his body, or to him and his seed, or to him and his children or offspring, would only create an estate for life, provided the estate be created by deed.[4]

§ 207. **"Heir" must not be used descriptively.** — So a gift to A and his eldest son and heir male of the said A begotten was held not to be an estate tail, the words "heir male" being qualified, explained, and limited to be the same thing as son, a description of the person to take, and not a term of limitation and inheritance.[5] But where the gift was by *devise*

[1] Co. Lit. 25 *b* ; 2 Bl. Com. 114; 2 Prest. Est. 402, 403 ; Wms. Real Prop. 30 ; Hurlburt *v.* Emerson, 16 Mass. 241.

[2] 2 Bl. Com. 115 ; Co. Lit. 27 *a* ; 2 Prest. Est. 536.

[3] Co. Lit. 20 *b* ; 2 Prest. Est. 485.

[4] 2 Prest. Est. 480.

[5] 2 Prest. Est. 481, 482.

to a man and his seed, or his heirs male, or his children, if he then have none, or to him and his posterity, or by other words showing an intention to restrain the inheritance to the descendants of the devisee, it would create an estate tail.[1]

§ 208. **The Rule in Shelley's Case** has given rise to questions of no little nicety and refinement in respect to estates tail, but it is treated more at length in another part of this work.[2]

§ 209. **Incidents of Estates Tail.** — Among the incidents of estates tail, the tenant may freely commit waste upon the premises as if he were tenant in fee-simple,[3] though he cannot by selling growing timber, authorize it to be cut after his decease, it being a right belonging to him only as tenant.[4] Dower and curtesy are also incidents of this as of estates in fee-simple,[5] and the tenant may not charge the estate by his agreements or with his debts or incumbrances, so as to affect it after his death.[6]

§ 210. **Tenant not bound to pay Incumbrances.** — If there are outstanding charges or incumbrances upon the estate, the tenant is not bound to pay them off; nor is he compellable by the reversioner or remainder-man to keep down the interest, except in special cases, although it is incumbent upon a tenant for life to do so. And the reason appears to be that equity considers the estate as his own, and that he may keep down the incumbrance or lose the estate as he pleases. But if he does pay it off, he is considered as doing it on his own account, and cannot by so doing make himself creditor of the estate for the amount, unless he takes an assignment to himself of the incumbrance which he pays.[7]

[1] 2 Bl. Com. 115; id. 381; 2 Prest. Est. 537; Nightingale *v.* Burrell, 15 Pick. 104; Moore *v.* Gary, 149 Ind. 51; s. c. 48 N. E. Rep. 630. But if the first gift is for life, the children take only a remainder. Taylor *v.* Taylor, 63 Penn. St. 481, 488.

[2] *Post*, § 1601 *et seq.*

[3] Co. Lit. 224 *a*; 1 Atk. Conv. 195; Jervis *v.* Bruton, 2 Vern. 251.

[4] Liford's Case, 11 Rep. 50.

[5] Co. Lit. 224 *a*.

[6] Wharton *v.* Wharton, 2 Vern. 3 and n.; 1 Atk. Conv. 197; Herbert *v.* Fream, 2 Eq. Cas. Abr. 28, § 34; Partridge *v.* Dorsey, 3 Har. & J. 302; 1 Cruise, Dig. 84.

[7] 1 Cruise Dig. 75; Tud. Cas. 638; Chaplin *v.* Chaplin, 3 P. Wms. 229; 2 Law Mag. 265, 266, 270. See as to equity appointing receivers to collect rents and keep

§ 211. **Merger not applicable to Estates Tail.** — As a proposition almost universal, where a greater and less estate come together in one person by the same right, without any intervening estate, they will unite in one, the lesser being merged or swallowed up in the greater. But this does not apply in case of estates tail. If the tenant acquire the reversion or remainder in fee-simple, it does not merge the limited estate which he has as tenant in tail. And this grows out of the statute *De Donis*, which meant to restrain him as tenant from passing this estate out of him, which he might easily have done if by his acquiring the reversionary interest it had merged in the reversion.[1]

§ 212. **Descent of Estates Tail.** — So long as an estate retains the character of an estate tail, it will descend, in due course of law, to the issue of the donee, who answer the requisite description, however remote in degree, from the person to whom the gift may have been originally made, each of whom in succession will be tenants in tail, with all the powers and rights which the common ancestor, the donee, had in respect to the estate, so long as there may by possibility be issue to answer to this description.[2]

§ 213. **Eldest Son, Heir in Tail.** — In England, the course of descent of estates in fee-simple and fee-tail general is the same by the common law; as, for example, to the oldest son, if the ancestor have sons.[3] And the same rule applies in this country, where the subject is not regulated by statute, the oldest son of the donee and his oldest son, and so on, taking in succession.[4]

§ 214. **Entails easily barred.** — And yet this theoretic perpetuity of succession has become of practically little effect, in view of the ease with which estates tail may be converted into fees-simple, both in England and in those States where they have not been wholly abolished.

down the interest on incumbrances upon estates tail, Story, Eq. § 835; Jeremy, Eq. Jur. 251, 252; Bertie *v.* Abingdon, 3 Mer. 560.

[1] Wiscot's Case, 2 Rep. 61; 1 Atk. Conv. 194; Roe *v.* Baldwere, 5 T. R. 104, 110; Poole *v.* Morris, 29 Ga. 374.

[2] 2 Prest. Est. 394; Wms. Real Prop. 53; Corbin *v.* Healy, 20 Pick. 514.

[3] Wms. Real Prop. 63; id. 45.

[4] Corbin *v.* Healy, 20 Pick. 514; Wight *v.* Thayer, 1 Gray, 284.

[5] Wms. Real Prop. 64; *post*, § 218.

§ 215. **How barred now in England.** — The mode of effectually barring these estates or converting them into estates in fee-simple was formerly by common recoveries, which have already been spoken of. Since these have been abolished in England, it may be done by deed executed by the tenant in tail and enrolled in chancery within six months after its execution, the form and effect of which is regulated by the statute 3 and 4 Wm. IV. c. 74. But its great length renders it necessary to refer the reader to the statute itself for its various provisions.[1]

§ 216. **Entailment by Marriage Settlement.** — It is very common in England to create a temporary entailment of lands in the donor's family by means of marriage settlements, which may extend through one generation, and until the person in the second who is to succeed to the estate, usually an oldest son, is of age to bar it by his deed, as he may do by consent of the tenant actually in possession. This he generally does by making a new settlement, usually in favor of an oldest son; and so primogeniture, as it obtains among the gentry there, is a matter of custom rather than of legal right, since these conveyances might always be made to strangers. To explain this, one form of making these settlements is to convey lands to the use of the husband for life, with provisions for the wife and daughters therein, and then to the oldest son who might be born of the marriage, in tail, and, in case of his dying without issue, then to the second son, and so on to the third; and to daughters in default of sons. And in this way the estate is locked up from alienation till some tenant in tail is twenty-one years of age, and sees fit to bar the entail in the manner above stated.[2]

§ 217. **Rule against Perpetuities.** — Still the policy of the law is against clogging the free alienation of estates, and, as will be shown hereafter, it has become an imperative, unyielding rule of law, first, that no estate can be given to the unborn child of an unborn child; and second, that lands cannot be limited in any mode so as to be locked up from

[1] Wms. Real Prop. 42, 43; id. 47, 48; Tud. Cas. 614; 1 Atk. Conv. 240–250; 2 Sugd. Vend. 282–290.

[2] Wms. Real Prop. 45. See Appendix A.

alienation beyond the period of a life or lives in being and twenty-one years after, allowing the period of gestation in addition, of a child *en ventre sa mère*, who is to take under such a limitation. This is borrowed from the rule above stated as to settlements where the first tenant in tail, after an estate for life, as soon as he arrives at twenty-one years, could convey the entailed estate.[1]

§ 218. **Possibility of Issue extinct.** — From the very definition of estates tail special, as above given, it must be obvious that cases may occur where it may, even while the tenant is still alive, have become impossible for any one to take as issue in tail. The estate may be limited to the heirs of his body of his wife Mary begotten, and she may have died without issue. As no other heirs can take, he becomes what is known as "tenant in tail, after possibility of issue extinct." It can apply only in cases of special tail; for if heirs of his body general might take, the law would not deem the possibility of issue extinct so long as he lives.[2] Such an estate is one of a peculiar character. It has ceased to be one of inheritance, and yet retains many of the qualities of an inheritable estate. The tenant is not punishable for waste, like a tenant for life, and yet may be restrained by chancery from malicious waste, although a proper tenant in tail could not be. He cannot any longer bar the entail, and if the remainder or reversion in fee were to descend upon him, it would merge his estate as tenant, as it would if he were a mere tenant for life.[3]

§ 219. **Entails in this Country.** — Estates tail were introduced into the English colonies with other elements of the common law, and in some of the colonies the mode of barring them by common recovery obtained before the Revolution.[4]

[1] Wms. Real Prop. 46; Cadell *v.* Palmer, 1 Clark & Fin. 372. Also, Tud. Cas. 331, 358–361.

[2] 3 Prest. Est. 394; Wms. Real Prop. 49.

[3] Wms. Real Prop. 49; 1 Cruise, Dig. 137; Co. Lit. 27 *b*, 28 *a*; Burton, Real Prop. § 747; 2 Sharsw. Bl. Com. 125, n.

[4] Walker, Am. Law, 299; 4 Kent, Com. 14; Lyle *v.* Richards, 9 S. & R. 330; Jackson *v.* Van Zandt, 12 Johns. 169. Story, 1 Const. 165, says that Virginia adopted entails, but not fines and recoveries. And see Hawley *v.* Northampton, 8 Mass. 34; Partridge *v.* Dorsey, 3 Har. & J. 302; Den *v.* Smith, 5 Halst. 39;

Common recoveries, as a mode of barring estates tail in Massachusetts, though formerly in use, were abolished in 1792.[1] Recoveries were also once in use in New Hampshire in barring estates tail; although in 1789 an act repealed the statute *De Donis* and abolished estates tail.[2] But now these estates are either changed into fees-simple or reversionary estates in fee-simple, and do not exist at all as estates tail, or may be converted into estates in fee-simple by familiar forms of conveyance, in the several States, by force of their respective statutes.[3] Nevertheless, the facility with which

Sullivan, Tit. 77; 4 Dane, Abr. 624; 2 Sharsw. Bl. Com. 119, n.; Baker *v.* Mattocks, Quincy R. 73. Recoveries were in use in New Jersey till abolished by statute in 1799. Croxall *v.* Shererd, 5 Wall. 283.

[1] 4 Dane, Abr. 82; Perry *v.* Kline, 12 Cush. 118, 126.

[2] Jewell *v.* Warner, 35 N. H. 176; Dennett *v.* Dennett, 40 N. H. 500.

[3] *Alabama.* Fees-tail are converted into fees-simple in the hands of the one to whom the conditional estate is given. Code 1896, § 1021.

Arkansas. Tenant in tail is made tenant for life, with remainder in fee-simple to the person to whom at common law the estate would first descend. Dig. of Stat. 1894, § 700.

California. Estates tail abolished. 2 Deering's Code, § 763.

Colorado. Fee-tail gives a life estate to the first taker and a remainder in fee to his children. Mills Stat. 1891, § 432.

Connecticut. The issue of the donee in tail takes a fee-simple. Rev. Stat. 1888, § 2952.

Delaware. Estates tail may be barred by fine and common recovery, or by deed. Tenants in tail may alien their lands in fee-simple by deed in the same way as if the estate were owned in fee-simple, if the same is acknowledged and duly proved. Rev. Stat. 1893, pp. 630, 631.

Florida. Entails prohibited. Rev. Stat. 1892, § 1818.

Georgia. Estates tail abolished. A grant to one and the heirs of his body creates a fee-simple. Code 1895, § 3086.

Illinois. Donee in tail is made tenant for life with remainder in fee-simple to the person to whom the estate would descend at common law. Rev. Stat. 1895, p. 307, § 6.

Indiana. Estates tail are abolished, and if no valid remainder is limited upon what in form is an estate tail, the donee has a fee-simple. Rev. Stat. 1894, § 3378.

Iowa. All limitations are void which suspend the absolute power of alienation longer than lives in being and twenty-one years. Code 1897, § 2901.

Kansas. Words of inheritance not required to create an estate in fee-simple. Every conveyance of real estate shall pass all the estate of the grantor therein unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant. 2 Gen. Stat. 1897, p. 599, § 2.

Kentucky. Estates which would otherwise be deemed estates tail are held to be

these estates may be barred by aliening them does not do away with the necessity of understanding the rules by which they are governed.

fees-simple. Gen. Stat. c. 63, art. 1, § 8; Pruitt *v.* Holland, 92 Ky. 641; s. c. 18 S. W. Rep. 852.

Maine. Tenant in tail may convey in fee-simple. Rev. Stat. 1883, p. 604, § 4.

Maryland. Same as Maine, and estates in fee-tail general will descend to heirs like estates in fee-simple. Code 1888, p. 258, § 24, p. 808, § 1; Chelton *v.* Henderson, 9 Gill, 438; Posey *v.* Budd, 21 Md. 477, 487.

Massachusetts. Pub. Stat. c. 120, § 15, tenant in tail may convey an estate in fee-simple by deeds in common form. But a tenant in tail in remainder cannot, by deed, convey any estate, either by way of grant or estoppel. Whittaker *v.* Whittaker, 99 Mass. 366; Holland *v.* Cruft, 3 Gray, 183; Allen *v.* Trustees, 102 Mass. 262, 265. Cf. Coombs *v.* Anderson, 138 Mass. 376. Nor can a married woman bar an entail by deed in which her husband does not join. Whittaker *v.* Whittaker, *supra*, 367. But the estate of a tenant in tail may be taken on execution, or may be sold by license of court after the death of a tenant in tail in possession, but not of a tenant in tail in remainder. Holland *v.* Cruft, *supra;* Allen *v.* Trustees, *supra.* Where land is held by one as tenant for life, with a vested remainder in tail to another, the tenant for life and remainder-man may convey the same in fee-simple by their deed, which deed will bar the estate tail and all remainders and reversions expectant upon it. Gen. Stat. c. 89, § 5.

Michigan. Estates tail are abolished, and such as would be at common law are declared fees-simple. Howell's Stat. 1883, § 5519.

Minnesota. Persons holding what would be an estate tail are to be "adjudged seised thereof as an *allodium.*" Stat. 1891, § 3954.

Mississippi. Estates tail are prohibited and declared to be fees-simple, except that lands may be limited to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainder-man, and in default thereof to the heirs of the donor in fee-simple. Code 1892, § 2436. The statute *De Donis* was never in force here. Jordan *v.* Roach, 32 Miss. 482.

Montana. Words of inheritance not requisite to create a fee. Sanders' Code 1895, § 1476.

Nebraska. "Heirs" not necessary to create a limitation of an estate in fee-simple. Comp. Stat. 1899, § 4143.

Nevada. Same as Nebraska. Gen. Stat. 1885, § 2618.

New Jersey. Estate tail general becomes a life estate in the donee with vested remainder to the heirs. 1 Gen. Stat. 1896, p. 1195.

New York. Estates tail abolished, and if no valid remainder is limited thereon, the tenant in tail takes a fee-simple. Rev. Stat. p. 1789.

North Carolina. Tenant in fee-tail is seised in fee-simple, and for a valuable consideration may convey it in fee. Code 1883, § 1325.

North Dakota. Estates tail abolished. Rev. Code 1895, § 3327.

Ohio. The issue of the donee in tail takes a fee-simple absolute. Rev. Stat. 1896, § 4200.

Oregon. Same as Nebraska. Hill's Ann. Laws, 1887, § 3005.

Pennsylvania. Fines and recoveries have the same effect to bar estates tail as in England. Tenants in tail may convey lands of which they are seised in the

same manner as if seised in fee, and thereby bar the entailment, as by a recovery. Pepper & Lewis's Dig., 1896, pp. 1878–1883; Price *v.* Taylor, 28 Penn. St. 107; Haldeman *v.* Haldeman, 40 Penn. St. 36; Ralston *v.* Truesdell, 178 Penn. St. 429; s. c. 35 Atl. Rep. 813.

Rhode Island. Tenant in tail may convey in fee-simple by deed in common form expressing the intention of barring the entail. Gen. Laws 1896, p. 654, § 14. Tenant in tail in remainder with the concurrence of the life tenant may bar the entail in the manner prescribed in the preceding section. p. 654, § 15; Sutton *v.* Miles, 10 R. I. 348.

South Carolina. Statute *De Donis* not in force here; estates in fee-simple conditional remain as at common law. Thomas *v.* Benton, 4 Desaus. Eq. 17; Burnett *v.* Burnett, 17 S. C. 545.

South Dakota. Estates tail abolished. Stat. 1899, § 3648.

Tennessee. All tenants in tail are seised in fee-simple. Code 1896, § 3673.

Texas. Neither primogeniture nor entailment can ever be in force. Const. art. 1, § 18.

Utah. "Heirs" not requisite to create a fee. Rev. Stat. 1898, § 1970.

Vermont. Donee in tail takes an estate for life, remainder in fee-simple absolute to him to whom the estate would pass upon his death. Stat. 1894, § 2201.

Virginia. Fee-tail converted into fee-simple. Code 1887, § 2421.

Washington. "Heirs" not necessary to create an estate in fee-simple. Ballinger's Ann. Codes 1897, § 4525.

West Virginia. Same as Virginia. Code 1893, p. 634.

Wisconsin. All estates tail changed into fee-simple in the tenant in tail. S. & B. Stat. 1889, § 2027.

Wyoming. "Heirs" not necessary to create a fee-simple. Rev. Stat. 1899, § 2737.

CHAPTER V.

ESTATES FOR LIFE.

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222. Construction of life grants.
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§ 220. **Definition and Creation.** — The next estate in importance, as computed in the scale of gradation, is an *estate for life*, because ordinarily measured, as to its duration, by the term of a human life, and regarded as a freehold. This is rather a class of estates, and embraces all freeholds which are not of inheritance, including estates held by the tenant for the term of his own life, or for the life or lives of one or more other persons, or for an indefinite period which may endure for the life or lives of persons in being, and not be-

yond the period of a life.[1] Nor does it change the character of a life estate so long as it remains such, that it may, upon the happening of a contingency, become enlarged into a fee.[2] These estates may be created by the act of some party, as by a deed or devise, or the operation of law, as in case of dower and curtesy.

§ 221. **Estate per auter Vie.** — Where the estate is in one during the life of another, it is technically called an estate *per auter vie*, and he whose life is the measure of its duration is styled *cestui que vie*.[3]

§ 222. **Construction of Life Grants.** — An estate for the tenant's own life is, in the estimation of the law, a better one and of a higher nature to him than one for the life or lives of another or others. And, as in construing grants where the language is equivocal, that construction is given which is most favorable to the grantee,[4] where a grant is made to one with no other words of limitation, he will be entitled to an estate during his own life, if the estate of the grantor will allow him to convey such an estate.[5] Instances of life estates are a grant to one expressly for life or to him without words of limitation, or to him during the life of another, or to a woman so long as she shall remain a widow, or to a man and woman during coverture, or so long as a man shall live in a certain house, or shall pay a certain sum, or until £100 be paid out of the income of the estate, even though the income of the estate be £10 by the year;[6] or so long as the grantee shall maintain salt-works on the land.[7] So the reservation by a grantor of the use and control of the granted premises during his life, creates in him a life estate with all its incidents.[8]

§ 223. **Among the Exceptions to the above** is a devise of

[1] Hewlins *v.* Shippam, 5 B. & C. 221 ; 2 Bl. Com. 121.

[2] Adams *v.* Adams, 6 Q. B. 860.

[3] 2 Bl. Com. 120 ; Co. Lit. 41 *b*. For what is evidence of the death of a *cestui que vie*, see Clark *v.* Owens, 18 N. Y. 434.

[4] Broom, Max. 457 ; 2 Bl. Com. 121.

[5] Co. Lit. 42 *a* ; Broom, Max. 458 ; 2 Bl. Com. 121.

[6] Co. Lit. 42 *a* ; Tud. Cas. 31 ; Jackson *v.* Myers, 3 Johns. 388 ; Roseboom *v* Van Vechten, 5 Denio, 414.

[7] Hurd *v.* Cushing, 7 Pick. 169.

[8] Webster *v.* Webster, 33 N. H. 18, 22 ; Richardson *v.* York, 14 Me. 216.

lands to executors until testator's debts are paid, which will pass a chattel and not a freehold interest. So if the grantor himself have only an estate for life, or is tenant in tail, the grant, if indefinite, shall be held to be for the life only of the grantor. And in the construction of wills, as well as of deeds by statute in several of the States, as heretofore stated,[1] it is often held that the devisor or grantor passes whatever estate he has, whether a fee-simple or less, as the case may be, though he do not make use of words of limitation and inheritance in his will or deed.[2] It matters not how contingent or uncertain the duration of the estate may be, or how probable is its determination in a limited number of years, if it is capable of enduring for the term of a life, it is within the category of estates for life.[3]

§ 224. **Life Estate by Implication.** — In many cases estates for life are held to be raised by implication, especially under devises, as where A devises his land to his heir after the death of B. Here, as no one but the heir could take except by the will, and by that he is postponed till the death of B, it is held that B is, by construction, made tenant for life. But if it had been to a stranger, after the death of B, no such inference would be raised, for the estate in the mean time would go to the heir.[4]

§ 225. **Estates per auter Vie — Freeholds.** — According to strict feudal notions, a tenancy *per auter vie* was not deemed of sufficient importance to be considered a freehold interest.[5] But estates *per auter vie* are now classed with, and have all the incidents of, freehold estates.

§ 226. **Merger of Life Estates.** — In measuring the duration of a life estate where the life of more than one person is referred to, the question is sometimes affected by the doctrine of merger, which applies where a greater and less estate unite in the same person, — the less being extinguished.[6] Thus an

[1] *Ante*, § 86.

[2] Co. Lit. 42 *a*. See Stat. of Wills, 1 Vict. c. 66, § 28; 2 Jarm. Wills, 181.

[3] 2 Flint. Real Prop. 232; Co. Lit. 42 *a*.

[4] 1 Jarm. Wills, 466, 476.

[5] 2 Bl. Com. 120; 1 Spence, Eq. Jur. 144; Wms. Real Prop. 17, 22. Mr. Williams is of the opinion that feuds were not originally, as some have supposed, held at the will of the lord.

[6] 2 Bl. Com. 177.

estate to A during life and the lives of B and C is considered cumulative, and will continue during the lives of all three.[1] But if it had been to A during the life of B, remainder to A, the estate to himself would be considered a greater estate than that during the life of the *cestui que vie*, and would therefore merge this so that A would simply have an estate for his own life in himself.[2] And in conformity with the doctrine of merger, if the owner of a reversion immediately expectant upon an estate for life grant his reversion to the tenant for life, it will merge the estate for life, even though the grant be a conditional one.[3] And this, whether the reversion be in fee, in tail, or for life only.[4]

§ 227. **When Life Estate is not merged.** — But if the tenant surrender to the reversioner, and this be on condition, and then an entry be made for condition broken, the tenant for life is in again of his original estate, and the estate for life survives. The effect of such an operation is not a complete merger, since a *surrender* is but "the consent of a particular tenant that he in remainder or reversion shall presently have possession."[5] If the tenant for life lease the premises to the reversioner for his, the reversioner's life, his estate does not merge in the reversion, because he parts with a less estate than he is supposed to have; and if he outlives the reversioner, he will take the estate again for the balance of his own life.[6]

§ 228. **Grant by Tenant for Life.** — If a tenant for his own life, as, for instance, a dowress, conveys that estate to another, the latter becomes thereby a tenant for life *per auter vie*.[7] A tenant for life is regarded as so far the owner of an independent estate, that, unless restrained by the terms of his grant, he may convey his entire interest, or carve any lesser estate out of the same in favor of another. In other words,

[1] Co. Lit. 41 *b*; 3 Prest. Conv. 225.

[2] 3 Prest. Conv. 225; Smith, Real & Pers. Prop. 939.

[3] Burton, Real Prop. § 764; Co. Lit. 218 *b*.

[4] Smith, Real Prop. 939.

[5] Burton, Real Prop. § 764; Smith, Real & Pers. Prop. 939; Termes de la Ley, "Surrender."

[6] Co. Lit. 42.

[7] Co. Lit. 41 *b*.

he may assign his entire estate or underlet the whole or any part of the same for a longer or shorter period, not exceeding that of his own.[1] He cannot, however, convey his estate except by deed.[2]

§ 229. **Effect of Feoffment in Fee by Life Tenant.** — [At common law, if a tenant made a feoffment in fee, his conveyance was void and the feoffor's estate was forfeited, upon the feudal notion that his act of making livery of seisin of an estate greater than he had was a renunciation of the feudal connection between himself and his lord.[3]] But it has never been held a ground of forfeiture that tenant for life had made a lease of the premises for years.[4]

§ 230. **No Forfeiture by Grant under Statute of Uses.** — But if the conveyance be by deed of bargain and sale, lease and release, or any form of deed under the statute of uses, which is not accomplished by the transmutation of possession, it would not, though in form a fee, convey any more than the grantor had to part with, and consequently, as it did not disturb the seisin of the reversioner or remainder-man, it would not work a forfeiture.[5]

§ 231. **Present English Law.** — And now under the statute of 8 & 9 Vict. c. 106, § 4, which declares that no feoffment made in wrong shall act tortiously, it would seem that this ground of forfeiture is removed in England.[6]

§ 232. **When Conveyance in Fee works Forfeiture in this Country.** — In this country the law seems to have been generally regarded as the same in this respect as in England. In those States where conveyances have the effect of feoffments, accompanied by livery of seisin, or may be made by common recoveries, it seems that a tenant for life may work a forfeiture of his land by conveying a greater estate than he has.[7] This is rather a theoretic than a practical principle, since the

[1] 1 Cruise, Dig. 108 ; Jackson *v.* Van Hoesen, 4 Cow. 325.

[2] Stewart *v.* Clark, 13 Met. 79.

[3] 1 Cruise, Dig. 108 ; 2 Bl. Com. 274, 275 ; 5 Dane, Abr. 6–8 ; Co. Lit. 251, 252 ; Wright, Ten. 201 ; Wms. Real Prop. 25 ; Jackson *v.* Mancius, 2 Wend. 365.

[4] Locke *v.* Rowell, 47 N. H. 46.

[5] 1 Cruise, Dig. 109 ; Stearns, Real Act. 11 ; Stevens *v.* Winship, 1 Pick. 318.

[6] Wms. Real Prop. 122.

[7] 2 Sharsw. Bl. Com. 121, n. ; Redfern *v.* Middleton, 1 Rice (S. C.), 459 ; Stump *v.* Findlay, 2 Rawle, 168. See Matthews *v.* Ward, 10 Gill & J. 449.

deeds ordinarily in use in the conveyance of lands, though recorded, do not operate to produce a forfeiture, though the tenant thereby affect to convey a larger estate than he has. Such deeds convey what the grantor has and nothing more.[1]

§ 233. **Other Grounds of Forfeiture.** — Immediately connected with the doctrine of forfeiture by granting a larger estate than the tenant for life has, is that of forfeiture by disclaiming the title of him under whom he holds, or affirming in a court of record that the reversion is in a stranger, by pleading, and the like. Although such was the common law, it has not, it is believed, ever obtained in this country.[2]

§ 234. **General Occupancy upon Death of Tenant per auter Vie.** — The estate for life *per auter vie* presented, at the common law, several noticeable peculiarities in certain contingencies. Thus, if the tenant died, living the *cestui que vie*, land was left open without any one having a legal right to claim it, — neither the reversioner, because the previous estate had not expired; nor the heir of the tenant, for his estate was not one of inheritance; nor his executor, because it was a freehold and not a chattel interest. Nor was it deemed to be

[1] McKee *v.* Pfout, 3 Dall. 486; Pendleton *v.* Vandevier, 1 Wash. 381; Rogers *v.* Moore, 11 Conn. 553; Bell *v.* Twilight, 22 N. H. 500; Stevens *v.* Winship, 1 Pick. 318; Walker, Am. Law, 277; Stearns, Real Act. 11; 4 Kent, Com. 84. In Maine it is held that if tenant by curtesy conveys in fee, he forfeits his estate, and reversioner may enter. French *v.* Rollins, 21 Me. 372. And in New Jersey a similar principle prevails both as to tenants by curtesy and in dower. 4 Kent, Com. 84. See also 5 Dane's Abr. 11–13, where a case is cited that a conveyance in fee in Massachusetts, in 1784, worked a forfeiture. Also a dictum of Judge Jackson, in Grant *v.* Chase, 17 Mass. 446, to same effect. But it is probably true that unless the case of dower or curtesy forms an exception, a tenant for life does not in any case work any forfeiture by conveying, in form, a greater estate than he has, since only what estate he has passes by such deed. This is declared to be the law by statute in many of the States, as in *Alabama*, Code 1896, § 1038; *Maine*, Rev. Stat. 1883, p. 604, § 5; *Massachusetts*, Pub. Stat. p. 1283, § 2202; *Michigan*, Howell's Stat. 1882, § 5654; *Minnesota*, Stat. 1891, § 4113; *New York*, Rev. Stat. 1896, p. 1813; *Wisconsin*, S. & B. Stat. p. 1283, § 2202. The same legislation will be found in several of the newer States. Grout *v.* Townshend, 2 Hill, 554; McCorry *v.* King's Heirs, 3 Humph. 267, 271, 277; Dennett *v.* Dennett, 40 N. H. 498, 505; Hotel Co. *v.* Marsh, 63 N. H. 230; Goodman *v.* Malcolm, 5 Kan. App. 285; s. c. 48 Pac. Rep. 439; Archer *v.* Jones, 26 Miss. 583; Kirksey *v.* Cole, 47 Ark. 504; s. c. 1 S. W. Rep. 778.

[2] Co. Lit. 251, 252; 1 Cruise, Dig. 109; 5 Dane, Abr. 11. How far this applies in cases of terms for years, it is not necessary here to discuss. See Jackson *v.* Vincent, 4 Wend. 633.

devisable. The consequence was, any one who first chose to take possession might do so, and was called a *general occupant.*[1] But the doctrine of *general occupancy* was practically abolished by the statute 29 Charles II. c. 3, and 14 Geo. II. c. 10, authorizing the tenant to devise it, or, if undevised, giving it to his executors to be administered as his assets.[2]

§ 235. **Heirs of Tenant per auter Vie as Special Occupants.** — [At common law, if an estate *per auter vie* was limited to A and his heirs, upon the death of the tenant, the *cestui que vie* living, the heirs were entitled to possession as *special occupants.* They took, not by inheritance, but simply as the persons designated as entitled to possession.] If the limitation had been to him and his executors and administrators, they would take, in like case, instead of his heirs.[3] [Nor in such case would the heirs take, if at all, as purchasers; for the ancestor is the complete owner of the estate, which he may alien at his pleasure, the heir only taking what is left undisposed of.[4]] But though the tenant *per auter vie*, with a *quasi* estate tail to the heirs of his body, may convey the estate by deed, it seems that, at common law, he cannot do it by will.

[1] 2 Bl. Com. 258; Co. Lit. 41 *b*; Wms. Ex'rs, 570.

[2] 2 Bl. Com. 259; Tud. Cas. 33.

[3] 2 Bl. Com. 359; Atkinson *v.* Baker, 4 T. R. 229; Wms. Ex'rs, 570; Tud. Cas. 33.

[4] Doe *v.* Robinson, 8 B. & C. 296; Doe *v.* Luxton, 6 T. R. 289; Allen *v.* Allen, 2 Dru. & W. 307; Norton *v.* Frecker, 1 Atk. 524. The subject is now regulated by statute, 1 Vict. c. 26, § 3, in England, 2 Wms. Ex'rs, 574, and generally by the statutes of the several States. Walker's Am. Law, 275; Wms. Real Prop. 21, note by Rawle; 4 Kent, Com. 27. In cases where there is an estate in A for the life of B, A has a freehold. But if he die before B, the residuum of the estate is declared to be a chattel interest, and treated as such in *Alabama*, Code 1896, § 4246; *New York*, Rev. Stat. 1876, p. 1789, § 6; *Wisconsin*, S. & B. Stat. § 2030; *Michigan*, Howell's Stat. 1882, § 5522. In *Arkansas* it is embraced and treated as real estate, in the law of descents and distribution, though all real estate is assets in the hands of executors and administrators. Dig. Stat. 1894, § 2488. In *North Carolina* it is deemed an inheritance of the deceased tenant *per auter vie* for purposes of descent. McBride *v.* Patterson, 78 N. C. 412. In *Rhode Island* it is made devisable. Gen. Laws 1896, p. 663, § 2. In *Massachusetts* it is devisable and descendible as real property. Gen. Stat. 1882, ch. 125, § 1. In *New Jersey* it is devisable, but if not devised it goes to executors or administrators, to be applied and distributed as personal. Gen. Stat. 1896, p. 3757, § 1. And the same in *Texas*, Batts' Civil Stat. § 5334. In *Maryland* it forms a part of personal assets, unless expressly limited to him and his heirs. Code 1860, art. 93, § 220.

The heirs of his body will take as special occupants, by virtue of the gift that created the life estate, in preference to the devisee of the tenant.[1]

§ 236. **Duty of Life Tenant — Defence of Title.** — [It was the duty of the tenant for life as tenant of the *præcipe* to defend against any of the real actions which concluded the title, thereby affecting the interest of the remainder-man or reversioner.[2] In this country, however, the only action to try title is ejectment, or some statutory equivalent therefor, judgment in which only affects the interests of the parties to the action, or of those who, by statutory permission, are cited in to defend.[3]] And the same effect, it would seem, has been produced in England by abolishing all real actions, except *quare impedit*, dower and ejectment, by the statute 3 & 4 Wm. IV. c. 27, § 36.[4]

§ 237. **Tenant cannot claim for Improvements.** — As a general proposition, if a tenant for life makes improvements upon the premises, he cannot claim compensation therefor from the reversioner or remainder-man, though he is under no legal obligation to do more than keep the premises in repair.[5] It is also generally true that he cannot make repairs or permanent improvements at the expense of the inheritance. But he may complete, at the expense of the estate, a mansion-house which has been begun by a testator under whom he holds. So the expense of putting a building, at first, into a tenantable condition, is a charge upon the estate, but that of keeping it in repair is upon the tenant for life.[6]

§ 238. **Payment of Interest — Incumbrances.** — An important duty imposed upon every tenant for life is that of keeping down the interest upon existing incumbrances upon the estate,

[1] Dillon *v.* Dillon, 1 Ball & B. 95; Grey *v.* Mannock, 2 Eden, 341, and note as to Lord Kenyon's dictum in Doe *v.* Luxton, 6 T. R. 289; Campbell *v.* Sandys, 1 Sch. & Lef. 281; Tud. Cas. 34; Allen *v.* Allen, 2 Dru. & W. 307.

[2] 1 Prest. Est. 207, 208; Stearns, Real Act. 99; Termes de la Ley, "Aid;" *ante*, § 129.

[3] See Oetgen *v.* Ross, 47 Ill. 142; Lowe *v.* Emerson, 48 Ill. 160.

[4] Wms. Real Prop. 371; 1 Spence, Eq. Jur. 225.

[5] Corbett *v.* Laurens, 5 Rich. Eq. 301; Moore *v.* Simonson, 27 Or. 117; s. c. 39 Pac. Rep. 1105; Datesman's Appeal, 127 Pa. St. 348; s. c. 17 Atl. Rep. 1086; Elam *v.* Parkhill, 60 Tex. 581; Miller *v.* Shields, 55 Ind. 71.

[6] Sohier *v.* Eldridge, 103 Mass. 345, 351; Parsons *v.* Winslow, 16 Mass. 361.

though, as a general proposition, he is not bound, as between himself and the reversioner or remainder-man, to pay the principal of any moneys charged upon it; and if he is obliged to do so, he becomes a creditor of the estate for the amount so paid, deducting the value of the interest he would have had to pay as tenant for life during his life.[1] On the other hand, if a tenant for life purchase in an outstanding incumbrance upon an estate, it is regarded as having been done for the benefit of the reversioner as well as himself, if the latter will contribute his proportion of the sum paid therefor.[2]

§ 239. **Taxes — Apportionment of Incumbrances.** — As between tenant for life and the remainder-man, ordinary taxes are to be paid by the tenant for life; but where the whole estate is subject to, or to be benefited by the discharge of an incumbrance not created by either of them, equity apportions it between both, the tenant for life having to keep down the interest during his life. A betterment charge — *e. g.*, an assessment for permanent benefits — comes within this category, being laid in view of the permanently increased value of the premises. The tenant for life must pay the accruing interest upon the amount during his life, and the remainder-man, after that, must pay the principal.[3] But though the tenant for life would be liable to the remainder-man for contribution at the rates above stated, if he pays the charge in full, he is not personally liable to the incumbrancer himself

[1] 1 Story, Eq. § 486 ; id. § 488 ; Warley *v.* Warley, 1 Bailey, Eq. 397 ; 4 Kent, Com. 76 ; Saville *v.* Saville, 2 Atk. 463 ; Mosely *v.* Marshall, 27 Barb. 42, 44 ; Mosley *v.* Marshall, 22 N. Y. 200; Ivory *v.* Klein, 54 N. J. Eq. 379 ; s. c. 35 Atl. Rep. 346 ; Parrish *v.* Ross, 19 Ky. Law Rep. 1676 ; s. c. 44 S. W. Rep. 134 ; Melms *v.* Pabst Brewing Co., 93 Wis. 140 ; s. c. 66 N. W. Rep. 244 ; Damm *v.* Damm, 109 Mich. 619, citing the text ; s. c. 66 N. W. Rep. 596 ; Kocher *v.* Kocher, 56 N. J. Eq. 545 ; s. c. 39 Atl. Rep. 535. And, it seems, he will not be obliged to pay towards the interest anything beyond the amount of the rents accruing, and, if he does, he will be a creditor of the estate for such excess. Kensington *v.* Bouverie, 7 De G. M. & G. 134 ; Tud. Cas. 60 ; Doane *v.* Doane, 46 Vt. 485.

[2] Daviess *v.* Myers, 13 B. Mon. 511.

[3] Plympton *v.* Boston Dispensary, 106 Mass. 544 ; Moore *v.* Simonson, 27 Or. 117 ; s. c. 39 Pac. Rep. 1105 ; Cairns *v.* Chabert, 3 Edw. Ch. 312 ; Tribbetts *v.* Huston, 69 Ill. App. 340. But if the improvement for which an assessment is laid is not of a permanent nature, *i. e.*, must be renewed from time to time, the entire assessment must be borne by the life tenant. Reyburn *v.* Wallace, 93 Mo. 326 ; s. c. 3 S. W. Rep. 482.

who holds the charge upon the estate. Thus a mortgagee could not make a personal claim upon the tenant for life of the mortgaged estate if the charge was not created by him.[1]

§ 240. **Mode of apportioning Incumbrances.** — Formerly, the mode of apportioning the payment of an incumbrance between tenant for life and remainder-man was one third upon the former and two thirds upon the latter. But that is now discarded as unreasonable.[2] In North Carolina, it is said, the courts do not recognize any arbitrary rule in apportioning such a payment, each case being generally referred to the master to settle by itself.[3]

§ 241. **Story's Rule of Apportionment.** — The rule stated by Story is this: "The tenant shall contribute beyond the interest in proportion to the benefit he derives from the liquidation of the debt, and the consequent cessation of annual payments of interest during his life (which, of course, will depend upon his age and the computation of the value of his life.)"[4] To make a practical illustration of this rule, which is only vague from an almost necessary want of definiteness in the application of the terms employed, suppose a tenant for life, a dowress, for instance, has been obliged, in order to save her estate, to pay the whole of a mortgage thereon, and the heir or reversioner wishes to redeem from her by contributing his share of the mortgage debt. Or suppose he has paid the whole, and she, in order to save her estate, wishes to contribute her share of the debt. Assuming that she is to pay the interest as long as she lives, except that she is to anticipate and pay it all at once in a gross sum, her share would be the present worth of an annuity equal to what that interest would amount to, computed for as many years as by the tables of the chances of life, regard being had to her state of health, she may be supposed to live. Of course the share of the heir or reversioner would be the residue of the sum paid for the redemption. And if, by reason of the mortgage being upon the whole of her husband's estate, she, as dowress, would only be liable to contribute the interest of

[1] Morley *v.* Saunders, L. R. 8 Eq. 594.

[2] 1 Story, Eq. § 487.

[3] Jones *v.* Sherrard, 2 Dev. & B. Ch. 179; Atkins *v.* Kron, 8 Ired. Eq. 1.

[4] Eq. Jur. § 487.

one third of the debt to correspond with her life interest in that proportion of the land, it can make no difference in the rule, but merely affects the form of the computation.[1] The same rule is applied upon the sale of an estate in which a tenant for life and a reversioner are interested, in apportioning the proceeds between them. So where a mortgage was devised to one for life, with remainder to another, and the same was redeemed, the redemption money was divided *pro rata* by the same rule. The value of the life estate, in such cases, is fixed at the time of sale or conversion of the estate into money, by reference to the common tables of the chances of life. Nor would the result be affected, though the tenant for life were to die after such conversion before any part of the proceeds had been paid over.[2]

§ 242. **Tenant's Duty to pay Taxes.** — In New York, where a tenant for life neglected to pay the taxes upon the land, a receiver was appointed to take so much of the rent as might be necessary to pay the taxes.[3] And it may be laid down as

[1] Swaine *v.* Perine, 5 Johns. Ch. 482; Gibson *v.* Crehore, 5 Pick. 146; Saville *v.* Saville, 2 Atk. 463; Bell *v.* The Mayor, 10 Paige, 49, 71; House *v.* House, 10 Paige, 158; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; 3 Pomeroy's Eq. § 1223. This computation would be made by a master or officer of the court. In Massachusetts and Kentucky the courts have made use of Wigglesworth's Tables. Eastabrook *v.* Hapgood, 10 Mass. 315, n.; Houghton *v.* Hapgood, 13 Pick. 154; Alexander *v.* Bradley, 3 Bush, 667; though tables have been adopted in general use more full and accurate than these, such as the Carlisle or Combined Experience Tables. Friend *v.* Burleigh, 53 Neb. 674; s. c. 74 N. W. Rep. 50; Allen *v.* Ames & C. R. Co., 106 Iowa, 602; s. c. 76 N. W. Rep. 848; Lincoln *v.* Power, 151 U. S. 436. See Wis. R. S. of 1898, p. 2461. In New York also, by Laws 1870, c. 717, §§ 1, 5, the Portsmouth or Northampton Tables are prescribed. In Alabama, the court has adopted the American Table of Mortality. Gordon *v.* Tweedy, 74 Ala. 232. So in Indiana. Huntington *v.* Burke, 21 Ind. App. 655; s. c. 52 N. E. Rep. 415. In Pennsylvania the Carlisle Tables are not authoritative. Shippen's Appeal, 80 Penn. St. 391. In Maryland, Dr. Halley's tables were adopted. Abercrombie *v.* Riddle, 3 Md. Ch. Dec. 320; but see Dorsey *v.* Smith, 7 Har. & J. 367; and in Wisconsin the Northampton Tables have been adopted by rule of court. See Sanborn & Berryman's Ann. Stat. § 3871, where will also be found an annuity table and a practical exposition of the method of use, on a basis of six per cent. interest. A much more comprehensive set of tables has been prepared on the basis of the Carlisle Tables by Messrs. Giauque and McClure, and entitled Dower and Curtesy Tables; Cincinnati, 1882. In applying any of these tables to particular cases, reference is had to the health as well as the age of the person.

[2] Foster *v.* Hilliard, 1 Story, 77.

[3] Cairns *v.* Chabert, 3 Edw. Ch. 312.

a duty uniformly incumbent upon a tenant for life, to pay all taxes assessed upon the land during his life.[1] In Ohio, if tenant for life fail to pay the taxes assessed upon the estate, he forfeits the same to the reversioner or remainder-man who may enter. But this is under the provisions of a statute of that State.[2]

§ 243. **Tenant cannot defeat Reversioner's Title through his own Wrong.** — [The life tenant cannot take advantage of his own wrong in failing to pay taxes by buying the property at tax sale to defeat the estate of the remainder-man or reversioner. As between life tenant and remainder-man such a purchase works only a payment of the taxes.[3] And if both life estate and remainder be destroyed by a valid tax sale to a stranger, the remainder-man has a personal remedy against the delinquent life tenant.[4] But the remainder-man may purchase at tax sale and set the tax title up against the life tenant, for he owed no duty to the life tenant to pay the taxes.]

§ 244. **Tenant's Possession that of Reversioner.** — The possession of a tenant for life is never deemed to be adverse to his reversioner.[5] Nor, if he be disseised, are the rights of the reversioner thereby affected, and he may enter or sue to recover possession within the period of limitations after the death of the tenant for life, without regard to the lapse of time during which the disseisor may have held the premises.[6] And if one who enters upon land under an agreement with a tenant for life continue to hold possession after his death, he

[1] Varney *v.* Stevens, 22 Me. 331, 334 ; Prettyman *v.* Walston, 34 Ill. 192.

[2] McMillan *v.* Robbins, 5 Ohio, 28.

[3] Burhaus *v.* Van Zandt, 7 N. Y. 523 ; Foley *v.* Kirk, 33 N. J. Eq. 170 ; Phelan *v.* Boylan, 25 Wis. 679 ; Dunn *v.* Snell, 74 Me. 22 ; Patrick *v.* Sherwood, 4 Blatchf. (U. S.) 112 ; Olleman *v.* Kelgore, 52 Iowa, 38 ; s. c. 2 N. W. Rep. 612.

[4] Watkins *v.* Green, 101 Mich. 493 ; s. c. 60 N. W. Rep. 44.

[5] Grout *v.* Townshend, 2 ill, 554 ; Austin *v.* Stevens, 24 Me. 520, 526 ; Varney *v.* Stevens, 22 Me. 331 ; Menger *v.* Carruthers, 57 Kan. 425 ; s. c. 46 Pac. Rep. 712 ; Austin *v.* Brown, 37 W. Va. 634 ; s. c. 17 S. E. Rep. 207.

[6] Jackson *v.* Mancius, 2 Wend. 357 ; McCorry *v.* King's Heirs, 3 Humph. 267, 375 ; Jackson *v.* Schoonmaker, 4 Johns. 390 ; Foster *v.* Marshall, 22 N. H. 491 ; Guion *v.* Anderson, 8 Humph. 298, 325. But it has been held in Illinois that adverse possession set the statute running during the life of the life tenant against the remainder-man in favor of the *bona fide* grantee in fee of the life tenant. Lewis *v.* Pleasants, 143 Ill. 271 ; s. c. 30 N. E. Rep. 323 ; 32 N. E. Rep. 384.

becomes as to the reversioner a mere trespasser.[1] It has been further held that if the tenant for life do any act with the property which works a forfeiture of the same, it only affects his interest, but not that of the reversioner.[2] So if the tenant does an act by which he incurs a forfeiture of the estate, the reversioner is not bound to treat the estate as merged in his own, and enter immediately; he may have his action after the death of the tenant for life, without being affected by the previous possession. Nor can a tenant for life who creates an estate by grant or otherwise defeat his grant by surrender to his landlord or reversioner.[3]

§ 245. **Apportionment of Rent.** — It is a principle in the law of landlord and tenant, that if the tenant is evicted before the expiration of his lease by a better title than that of his lessor, he will not be liable for rent for the unexpired term during which he had enjoyed it; and one ground is, that, the contract being entire, such rent is not apportionable. So if a tenant for life underlet the premises for a certain term, reserving rent payable at a certain day, and die before that day, his executors could not, at common law, recover the rent accruing between the last rent-day and the day of his death; which they might have done had he survived to the beginning of the day on which the rent fell due.[4] In Alabama, if a life estate falls in before the end of the year, the remainder-man has the rent accruing from the death of the tenant for life to the end of the year, subject to the right of emblements.[5] Where, however, as was sometimes the case, a tenant for life had a power to lease for a term beyond the period of his own life, and made such a lease, and died before the last moment of the day on which the rent was due, though within an hour of midnight, the rent went to the reversioner, and was not apportionable, and no part was recoverable by the representatives of the tenant for life. For as the lease continued after the life tenant's death, the rent did not become

[1] Williams *v.* Caston, 1 Strobh. 130.

[2] Archer *v.* Jones, 26 Miss. 583, 589.

[3] Moore *v.* Luce, 29 Penn. St. 260.

[4] Clun's Case, 10 Rep. 128; Fitchburg Co. *v.* Melvin, 15 Mass. 268; Perry *v.* Aldrich, 13 N. H. 343; 2 Bl. Com. 124; 3 Cruise, Dig. 283, 306.

[5] Price *v.* Pickett, 21 Ala. 741.

fully due till the last moment of the day on which it was reserved.[1]

§ 246. **Present Rule as to Apportionment of Rents.** — But now these defects as to apportioning rents are supplied by the statute 11 Geo. II. c. 19, § 15, giving in the first case a right of action to the executors of tenants for life to recover *pro tanto* for the time the tenant actually enjoyed the premises under his lease; and in the latter case, by the statute 4 & 5 Wm. IV. c. 22, § 2, apportioning the rent between the tenant for life and the reversioner *pro rata* as to time.[2] The statute of 11 Geo. II. has been re-enacted in some of the States, and practically adopted through the courts in others.[3] If the lessee be tenant *per auter vie*, and the term come to an end by the death of the *cestui que vie* before the day of payment of rent, it is not within the language of the statute of 11 Geo. II., and the rent is not apportionable, and cannot be recovered for the time the tenant may have occupied between the last time of payment and the death of the *cestui que vie*.[4] And a like principle applies in the case of annuities. If an annuitant die before the expiration of the period at which the annuity is payable, it is lost; his representatives can recover no part of what is in arrear since the prior day of payment. Hence the importance of providing for such contingencies by the terms by which the lease or annuity is created.[5]

[1] Strafford *v.* Wentworth, 1 P. Wms. 180; Rockingham *v.* Penrice, id. 178; Norris *v.* Harrison, 2 Madd. 268; Wms. Ex'rs, 709. Royalties from a coal lease go to tenant for life. Wentz's App., 106 Penn. St. 301; McClintock *v.* Dana, id. 386; Shoemaker's App., id. 392.

[2] Wms. Ex'rs, 709; Wms. Real Prop. 27. These statutes apportion the rent as to time. The effect of tenant being deprived of part of the premises, or of lessor conveying the reversion of part of the estate upon the rent, remains as at common law. 3 Kent, Com. 469, 470.

[3] 3 Greenl. Cruise, 306, n. Re-enacted in Massachusetts, St. 1869, c. 368, § 1; Pub. Stat. c. 121, § 8; and extended to all contingent determinations of the lessor's estate. Borie *v.* Crissman, 82 Penn. St. 125. See 1 Stim. Am. St. Law, § 2027.

[4] Perry *v.* Aldrich, 13 N. H. 343.

[5] Wiggin *v.* Swett, 6 Met. 194; Dexter *v.* Phillips, 121 Mass. 178.

CHAPTER VI.

ESTATES FOR LIFE — ESTOVERS.

§ 247. Tenant's right to estovers.
248. What are estovers.
249. Exceeding the right of estovers, waste.
250. Examples.
251. Reasonable estovers.
252. Right to cut timber for repairs.
253. Right to estovers assignable.

§ 247. **Tenant's Right to Estovers.** — Among the incidents of all estates for life, and the same is true of estates for years, is that to take *estovers* or *botes* from the premises, if they are capable of supplying them, in the way of compensation for the duty of occupying and managing the same in a prudent manner, and keeping the parts thereof in suitable repair.[1]

§ 248. **What are Estovers.** — These estovers are of three kinds: 1, house-bote; 2, plough-bote; and 3, hay-bote. The first of these is a sufficient allowance of wood to repair or burn in the house. This latter is often called fire-bote. The second, for making and repairing all instruments of husbandry. The third, for repairing hedges or fences; "hay" meaning "a hedge." And these estovers must be reasonable in quantity or amount.[2]

§ 249. **Exceeding the Right of Estovers, Waste.** — As the destruction of growing timber and wood affects the value of the inheritance, if the tenant exceed what is reasonably necessary in cutting for the purposes above stated, he would,

[1] Hubbard *v.* Shaw, 13 Allen, 120, 122; Cowel, Interp. *Estovers*), derives the word from the French, *estouver*, equivalent to *fovere*, to nourish or maintain. "The name *estovers* containeth house-bote, hay-bote, and plough-bote." "Bote," says the same author, "signifieth compensation; hence also comes our common phrase, 'to give to boot, that is, *compensationis gratia.*'" See also Co. Lit. 41 *b*. Blackstone derives estovers from *estoffer*, to *furnish*. 2 Bl. Com. 35.

[2] Co. Lit. 41 *b*; 2 Bl. Com. 35; Cowel, Interp. "Haye;" Smith *v.* Jewett, 40 N. H. 530.

to the extent of such excess, be guilty of waste, the consequences and nature of which will be hereafter explained.[1] In the first place, he must only cut such timber or wood as he needs for present use. To cut these in anticipation of future use would be waste.[2] So he must cut only such as is fit for the purpose. It would be waste to cut what was unfit, though he exchanged it for what was suitable.[3] In the next place, the tenant must only cut such timber, etc., as is necessary for use, and it must also be used by him upon the premises, and not elsewhere. He may not cut timber and exchange it for firewood or fencing-stuff, nor cut wood or timber and sell it, though needed for his comfort or support.[4] Nor can he cut and sell wood to pay the expense of cutting and drawing that which he needs, and used for his own comfort upon the premises.[5] [Nor can he cut timber to make improvements which he is not bound to make — *e. g.*, to replace a building destroyed by the act of God.[6]] Nor could a dowress cut and sell wood from the premises, though she procured as much for actual consumption upon the same from other sources, and to that extent relieved the estate from the charge of supplying firewood.[7]

§ 250. **Examples.** — Where a widow had dower out of two distinct estates, with a dwelling-house on both, but no woodland upon one of them, it was held that she could not cut wood upon one of these to burn in the house upon the other, though she occupied the latter as her dwelling-place.[8] But

[1] 2 Bl. Com. 122. See this subject examined, 3 Dane, Abr. 238, 239 ; *post*, § 273 *et seq.* ; Webster *v.* Webster, 33 N. H. 21.

[2] Gorges *v.* Stanfield, Cro. El. 593.

[3] Simmons *v.* Norton, 7 Bing. 640.

[4] White *v.* Cutler, 17 Pick. 248 ; Padelford *v.* Padelford, 7 Pick. 152 ; Richardson *v.* York, 14 Me. 216 ; Elliott *v.* Smith, 2 N. H. 430 ; Sarles *v.* Sarles, 3 Sandf. Ch. 601 ; Livingston *v.* Reynolds, 2 Hill, 157; Simmons *v.* Norton, 7 Bing. 640 ; Webster *v.* Webster, 33 N. H. 21; Miles *v.* Miles, 32 N. H. 147; Robinson *v.* Kirne, 70 N. Y. 147; Modlin *v.* Kennedy, 53 Ind. 267; Armstrong *v.* Wilson, 60 Ill. 226. In a hard case Judge Story adopted somewhat different rules of law, in Loomis *v.* Wilbur, 5 Mason, 13.

[5] Johnson *v.* Johnson, 18 N. H. 597.

[6] Miller *v.* Shields, 55 Ind. 71.

[7] Phillips *v.* Allen, 7 Allen, 115.

[8] Cook *v.* Cook, 11 Gray, 123. And such seems to be the law in New Hampshire. Fuller *v.* Wason, 7 N. H. 341 ; Miles *v.* Miles, 32 N. H. 147.

in other cases it has been held that, if dower consist of several parcels, and she takes wood from one to make repairs upon another, or to burn in her dwelling-house upon another, it will not be deemed waste, though these parcels are the inheritances of different reversioners.[1] So where there was a farm and outlands, and it had been customary for the tenant to cut the wood for the dwelling-house upon the outlands, it was held not to be waste in the tenant for life to cut it upon the farm, if such cutting did not essentially injure the farm as an inheritance.[2]

§ 251. **Reasonable Estovers.** — As an example of the extent to which estovers would be deemed reasonable, we find that it is held that upon a farm of one hundred and sixty-five acres the tenant might not take firewood for two houses, one the principal one, the other that of the farmer or laborer who did the work upon it, although it had been customary to do so.[3]

§ 252. **Right to cut Timber for Repairs.** — In England a stricter rule is applied in respect to allowing estovers than that in use in this country, from the different condition of the two countries in respect to the economical management of estates. Probably the same rule would be applied here as there, that if the tenant suffers houses to go to decay and then cuts timber to repair them, it would be deemed double waste.[4] But it is doubtful if the tenant here would, as there, be restricted in all cases from cutting timber for constructing new walls or fences, though in both he may take sufficient to keep such fences, etc., in repair, as were upon the premises

[1] Owen *v.* Hyde, 6 Yerg. 334; Dalton *v.* Dalton, 7 Ired. Eq. 197. And so in an early case in Massachusetts. Padelford *v.* Padelford, 7 Pick. 152. And in New Hampshire, Gen. Stat. 1901, c. 195, § 8, and Maine, Rev. Stat. 1883, c. 103, § 13, a widow is authorized to take necessary fuel from her dower lands to supply her own residence, though not upon the dower lands. This difference of view in the cases in New England from that held in other States may perhaps be due to the doctrine obtaining in the former in respect to dower in wild lands.

[2] Webster *v.* Webster, 33 N. H. 26.

[3] Sarles *v.* Sarles, 3 Sandf. Ch. 601. See Smith *v.* Jewett, 40 N. H. 530, 532; Gardiner *v.* Dering, 1 Paige, 573. And upon the principles stated in the text, a tenant has not the right to dig clay upon a farm and make it into bricks for sale, or to use wood from the farm for their manufacture. Livingston *v.* Reynolds, 2 Hill, 157.

[4] Co. Lit. 53 *b*.

when he took them.[1] And while he is not bound to repair a house already ruinous, he may do so with timber taken from the premises.[2] [What is timber and how the right of a tenant to cut trees may be controlled by custom are discussed *post*, § 273 *et seq.*]

§ 253. **Right to Estovers assignable.** — Any right of estovers belonging to a tenant would pass to his grantee of the estate, or to one who should levy thereon for debt.[3] But the right to estovers, being simply incidental to the estate, is not the subject of assignment apart from the estate. Any assignment of the estate would, however, carry the right to estovers with it as an incident.

[1] Co. Lit. 53 *b*; Miles *v.* Miles, 32 N. H. 147, 163.

[2] Co. Lit. 54 *b*.

[3] Fuller *v.* Wason, 7 N. H. 341; Roberts *v.* Whiting, 16 Mass. 186; Smith *v.* Jewett, 40 N. H. 533; Cook *v.* Cook, 11 Gray, 123.

CHAPTER VII.

ESTATES FOR LIFE — EMBLEMENTS.

§ 254. Tenant's right to emblements.
255. Emblements — General characteristics.
256. Emblements — Particular crops.
257. Right of dowress.
258. Actual planting essential.
259. Tenant's estate must be of uncertain duration.
260. Tenant must not terminate his own estate.
261. Tenant by sufferance not entitled.
262. Right of tenant's assignee or sub-lessee.
263. Right of vendee of crop.
264. Right of reversioner's grantee to claim crops.
265. When growing crops not emblements.
266. Liford's Case.
267. The right to enter and cultivate.
268. Usage affects right to emblements.
269. Tenant's right subject to prior mortgage.

§ 254. **Tenant's Right to Emblements.** — Another of the important rights which a tenant for life has, as also other tenants of estates of uncertain duration, is that of *emblements*, or profits of the crop (*emblavence de bled*), which the law gives to him, or if he is dead, to his executors or administrators, to compensate for the labor and expense of tilling, manuring, and sowing the land.[1]

§ 255. **Emblements — General Characteristics.** — These crops are such as are the growth of annual planting and culture, and the right to take them after the termination of the tenancy rests partly upon the idea of compensation, but chiefly upon the policy of encouraging husbandry, by assuring the fruits of his labor to the one who cultivates the soil.[2] The term "emblements" is applied also at common law to annual

[1] Wms. Ex'rs, 597; Co. Lit. 55 *a*.

[2] 2 Bl. Com. 122; Co. Lit. 55 *b*; Stewart *v.* Doughty, 9 Johns. 108; 1 Rolle, Abr. 726, c. 9.

crops growing upon the land of one who dies before they are harvested. At common law, they go to his personal representatives rather than his heirs. But in Mississippi, such crops go to the heir, unless the judge of probate appropriates them to the executor or administrator to be administered.[1] The right to emblements carries with it that of entering upon and cultivating the land, and harvesting the crops when ripe.[2]

§ 256. **Particular Crops.** — Among the crops which are considered to be legally the subject of emblements are corn, pease, beans, tares, hemp, flax, saffron, melons, potatoes, and the like, and grasses, such as sainfoin, which are annually renewed. And, by way of exception to the general rule, hops, though grown on permanent roots, and turpentine, though taken from trees, are the subject of emblements, because they require annual training and culture to produce or gather.[3] But clover or other grasses that endure more than one year are not included, nor the fruits of trees growing upon the land, though planted by the tenant, because he knows when he plants them that they cannot come to maturity and produce their fruit in a single year to repay the labor bestowed upon their planting and culture.[4] Though it seems that trees, shrubs, etc., planted by gardeners and nursery-men simply for sale, may be considered as embraced under emblements as between executor of tenant for life and remainderman or reversioner.[5]

§ 257. **Right of Dowress.** — There was an exception, at common law, in respect to emblements in case of a dowress, because it was presumed that when her husband died she took the estate with the crops upon it, and therefore, though she

[1] McCormick *v.* McCormick, 40 Miss. 760; 1 Wms. Ex'rs, 594; 2 Redfield, Wills, 143. See *ante*, § 11.

[2] Co. Lit. 56 *a*; *post*, § 267.

[3] Wms. Ex'rs, 597; 2 Sharsw. Bl. Com. 123, n.; Com. Dig., "Biens," G. 1; Co. Lit. 55 *b*, n. 364; Lewis *v.* McNatt, 65 N. C. 63; State *v.* Moore, 11 Ired. 70. Fobes *v.* Shattuck, 22 Barb. 568, that wheat straw is emblements, and belongs to the tenant.

[4] Wms. Ex'rs, 598, 599; Evans *v.* Inglehart, 6 G. & J. 171, 188; Reiff *v.* Reiff, 64 Penn. St. 134, 137. So a tenant who has harvested his crop in June cannot take as emblements stubble ploughed in and growing in November, when the tenancy ended in September. Hendrixson *v.* Cardwell, 9 Baxt. 389.

[5] Penton *v.* Robart, 2 East, 88; Taylor, Land. & T. 81.

died after having planted a crop, it went to the reversioner. But by the statute of Merton, 20 Hen. III. c. 2, the growing crop might be devised by her, or would go to her executors.[1]

§ 258. **Actual planting essential.** — But it is essential to the claim of emblements, at the common law, that the crop should have been actually planted during the life and occupancy of the tenant. No degree of preparation of the ground will give to one the fruits of seed planted by another after the determination of his tenancy.[2]

§ 259. **Tenant's Estate must be of Uncertain Duration.** — [The right to emblements is not an incident to life estates alone, but to all estates of uncertain duration (excepting estates by sufferance). If a tenant, knowing that his estate] will terminate before he can gather his crop, plants it, it is his own folly or generosity to his successor who will take it.[3] So where one entered under an agreement of purchase and sale of the land between him and the owner, and planted crops, and the landowner then refused to convey the land, the tenant was held to be entitled to the same as emblements, on the ground that he had been occupying as a tenant at will.[4] But where one in possession of land, for the recovery of which a suit was pending against him, let the same to one cognizant of the suit, who planted crops, and before they were gathered the claimant in the suit prevailed and expelled the tenant, it was held that the latter could not claim the crop as emblements.[5]

§ 260. **Tenant must not terminate his own Estate.** — So, in the second place, the tenancy must be determined by the act of God, as by death of the tenant, or the act of the lessor in

[1] Co. 2d Inst. 80.

[2] Price *v.* Pickett, 21 Ala. 741; Gee *v.* Young, 1 Hayw. 17; Stewart *v.* Doughty, 9 Johns. 108; Taylor, Land. & T. 82; Thompson *v.* Thompson, 6 Munf. 514; Reeder *v.* Sayre, 70 N. Y. 180; s. c 26 Am. Rep. 567.

[3] Debow *v.* Colfax, 5 Halst. 128; Kittredge *v.* Woods, 3 N. H. 503; Whitmarsh *v.* Cutting, 10 Johns. 360; Taylor, Land. & T. 81; Chesley *v.* Welch, 37 Me. 106; Harris *v.* Carson, 7 Leigh, 632; Termes de la Ley, "Emblements." Hence a tenant for a single year has been held not entitled. Reeder *v.* Sayre, 70 N. Y. 180. But where the tenancy was an oral one for two years with a right to emblements, it was held that this was not cut off by an insufficient notice to quit. Ibid.

[4] Harris *v.* Frink, 49 N. Y. 24.

[5] Rowell *v.* Klein, 44 Ind. 290.

expelling him or terminating his lease; for if the tenant abandons the premises, or voluntarily puts an end to the tenancy, he has no right to claim emblements.[1] Thus, if a woman, tenant during widowhood, marry, she loses her right to emblements.[2] And these principles apply in cases of tenancies at will.[3]

§ 261. **Tenant by Sufferance not entitled.** — But a tenant by sufferance is not entitled to emblements.[4] Where, however, a purchaser under a foreclosure sale suffered the tenant, either the mortgagor or one claiming under him, to occupy the premises without interference for the term of three months, and in the mean time to go on and manage it, and plant crops, it was held to give the tenant a right to claim these as emblements.[5]

§ 262. **Right of Tenant's Assignee or Sublessee.** — This right to emblements is not limited to the original lessee or tenant for life, unless he is restricted by the terms of his lease from underletting or assigning his term. His assignee, grantee, or sublessee not only has a claim for the same emblements as the original tenant, but in some cases may claim these where the former could not himself have made such claim. Thus if the original tenant were to forfeit his estate by failing to perform a condition, or by committing a breach of a condition prescribed in his lease, he would thereby lose all right to the emblements. But if, before such breach on his part, he should assign or underlet to another, and the estate should be defeated by such breach, his undertenant or assignee would, nevertheless, be entitled to the growing crop which he had planted. As, for instance, if a tenant during widowhood should underlet and then marry, though she would by so

[1] Cases *supra;* Whitmarsh *v.* Cutting, 10 Johns. 360; Chesley *v.* Welch, 37 Me. 106; 2 Bl. Com. 123; Oland's Case, 5 Rep. 116; Chandler *v.* Thurston, 10 Pick. 205, 210; Bradley *v.* Bailey, 56 Conn. 374; s. c. 15 Atl. Rep. 746; s. c. 7 Am. St. Rep. 316.

[2] Hawkins *v.* Skeggs, 10 Humph. 31; Debow *v* Colfax, 5 Halst. 128.

[3] Termes de la Ley, "Emblements;" Davis *v.* Thompson, 13 Me. 209; Davis *v.* Brocklebank, 9 N. H. 73; Sherburne *v.* Jones, 20 Me. 70; Stewart *v.* Doughty, 9 Johns. 108; Oland's Case, 5 Rep. 116; Chandler *v.* Thurston, 10 Pick. 205; Brown *v.* Thurston, 56 Me. 126; s. c. 96 Am. Dec. 438.

[4] Doe *v.* Turner, 7 M. & W. 226.

[5] Allen *v.* Carpenter, 15 Mich. 25, 38.

doing lose her own right to emblements, her tenant would not, because he was not in fault.[1]

§ 263. **Right of Vendee of Crop.** — But if the tenant, having planted the crop, sell it as a growing crop, and then terminate his estate by his own act, the vendee will have no better right in respect to such crop than the lessee himself, and cannot claim it as emblements.[2]

§ 264. **Right of Reversioner's Grantee to claim Crops.** — If the owner of land on which he has planted a crop sells the land, it passes a complete title to the crop. And if he convey a reversion, subject to an existing particular estate, it carries with it, as incident to such reversion, the same rights in respect to crops growing on the premises which the grantor himself has.[3]

§ 265. **When Growing Crops not Emblements.** — If the owner of land plant crops and then convey the estate to one for life, with remainder over in fee, and the tenant for life die before the crop is gathered, it will not go to the personal representatives of the tenant for life, because he did not plant it; but to the remainder-man as a part of the inheritance.[4] So if a woman seised for life or in fee sow her land and marry, and her husband die before the crop is severed, she and not his representatives shall have the crop.[5] But if the husband of tenant for life sow crops, and she dies, he will be entitled to the emblements.[6] And in the case above supposed, if the grant for life had been to husband and wife and the survivor, and the husband had died, the wife would have

[1] 2 Bl. Com. 124; Bevans *v.* Briscoe, 4 Har. & J. 139; Taylor, Land. & T. 81; Davis *v.* Eyton, 7 Bing. 154; Tud. Cas. 62; Bulwer *v.* Bulwer, 2 B. & A. 470. *Contra*, Oland's Case, 5 Rep. 116; Bittinger *v.* Baker, 29 Penn. St. 66.

[2] Debow *v.* Colfax, 5 Halst. 128.

[3] Foote *v.* Colvin, 3 Johns. 216; Burnside *v.* Weightman, 9 Watts, 46.

[4] Wms. Ex'rs, 602; Grantham *v.* Hawley, Hob. 132.

[5] Tud. Cas. 62, cites Vin. Abr. "Emblements."

[6] Spencer *v.* Lewis, 1 Houst. 223. This rule, however, is undoubtedly abrogated in those States where, under the Married Women's Separate Property Acts, the husband acquires no estate by marriage in his wife's real property. Knapp *v.* Smith, 27 N. Y. 277; Rush *v.* Vought, 55 Penn. St. 437; Feller *v.* Alden, 23 Wis. 301; Dayton *v.* Walsh, 47 Wis. 113. *Contra*, Moreland *v.* Myall, 14 Bush, 474, where the crop is held to be personalty, and, as such, the property of the husband, — the statute not changing the common law right of the husband to the personal property of the wife.

taken the crops instead of the representatives of the husband.[1]

§ 266. **Liford's Case.** — It was held in Liford's Case that, if a disseisor take the crops growing upon the premises, and the disseisee recover possession of the land, he may have trespass for such taking against the disseisor,[2] but that if the disseisor make a feoffment or lease of the premises, and the feoffee or lessee take the crops, the disseisee cannot have trespass for such taking, even after regaining possession, for the tenant came in by title.[3] But this latter proposition has often been questioned, and is in some States expressly denied to be law, and the disseisor's lessee, as well as his heirs, held liable to the disseisee.[4]

§ 267. **The Right to enter and cultivate.** — To avail himself of the emblements, it is obvious that the tenant or his representative must have some right of entry or occupancy of the land itself; and if the tenancy is determined by death or otherwise soon after the planting of a crop, this right may of necessity be continued for some months. The extent of this right may be stated to be this: He may enter upon the land, cultivate the crop if a growing one, cut and harvest it when fit, and if interfered with in the reasonable exercise of these privileges by the landlord or reversioner, or if the crop be injured by him, he may have an action for the same.[5] But this does not give him a right to exclusive possession of the land, but merely the right of ingress and egress for the purposes above mentioned, while, for all other purposes, the landlord or reversioner is in exclusive possession.[6]

§ 268. **Usage affects Right to Emblements.** — [In this country it is held that what are lawful estovers and emblements often depends on the usages of different localities;] usage,

[1] Haslett *v.* Glenn, 7 Har. & J. 17.

[2] In Simpkins *v.* Rogers, 15 Ill. 397 ; Crotty *v.* Collins, 13 Ill. 567, it was held that trover lay. In Lindsey *v.* Winona R. R., 29 Minn. 411, however, the liability to the disseisee was limited to crops planted by the latter, or for grass or other *fructus naturales;* while in Page *v.* Fowler, 39 Cal. 412, a liability for crops, even of hay, was denied.

[3] Liford's Case, 11 Rep. 51, and see Termes de la Ley, "Emblements."

[4] Trubee *v.* Miller, 48 Conn. 347 ; Emerson *v.* Thompson, 2 Pick. 473, 485.

[5] Forsythe *v.* Price, 8 Watts, 282.

[6] Humphries *v.* Humphries, 3 Ired. 362 ; Wms. Ex'rs, 605 ; Lit. § 68.

where it is applied, being considered as entering into and forming a part of the contract or title by which the tenant holds.[1] Thus it is held a valid custom in Pennsylvania, New Jersey, and Delaware, that if the tenant sows crops in the autumn, which will not be ready for harvesting till the next autumn, he may claim them as emblements, although, in the mean time, his lease may have expired.[2] So it was held in Ohio that the parties to a lease in which nothing is said of the way-going crop will be governed by the custom of the place in which the land is situate. Thus where a lease ended on the 1st of April, the tenant was held to be entitled to a crop of wheat then growing thereon.[3] And the same doctrine is applied in Maryland.[4]

§ 269. **Tenant's Rights Subject to Prior Mortgage.** — [If land be mortgaged and then leased, a decree of strict foreclosure passes the growing crops to the mortgagee, whether they were planted by the mortgagor or his tenant.[5]] But a foreclosure after the crops are severed does not carry an interest in them to the mortgagee or purchaser.[6] [The same rule obtains generally in the case of equitable foreclosure; the right of the purchaser to the crops dating from the execution of the deed

[1] Van Ness *v.* Pacard, 2 Pet. 137, 148; Taylor, Land. & T. 82, 83; Stultz *v.* Dickey, 5 Binn. 235.

[2] Gordon *v.* Little, 8 S. & R. 533; Van Dorin *v.* Everitt, 2 South. 460; Templeman *v.* Biddle, 1 Harringt. 522; Clark *v.* Harvey, 54 Penn. St. 142; Shaw *v.* Bowman, 91 Penn. St. 414; Smith, Land. & T. 258, Am. ed., n. But this is not uniformly true, for a tenant could not thus sow his ground with oats and claim to occupy till they were ripe after the natural expiration of his lease, if sown, for instance, in March, and the lease expires in April. Howell *v.* Schenck, 24 N. J. L. 89. But no such custom exists in New York. Reeder *v.* Sayre, 70 N. Y. 180. In Virginia the validity of such a custom is denied. Harris *v.* Carson, 7 Leigh, 632; s. c. 30 Am. Dec. 510.

[3] Foster *v.* Robinson, 6 Ohio St. 90, 95, where the court cite, as to custom making law, Wigglesworth *v.* Dallison, Doug. 201; Hutton *v.* Warren, 1 M. & W. 466.

[4] Dorsey *v.* Eagle, 7 G. & J. 321.

[5] Lane *v.* King, 8 Wend. 584; Shepard *v.* Philbrick, 2 Denio, 174; Crews *v.* Pendleton, 1 Leigh, 297; Gillett *v.* Balcom, 6 Barb. 370; Jones *v.* Thomas, 8 Blackf. 428; Howell *v.* Schenck, 24 N. J. 89.

[6] Buckout *v.* Swift, 27 Cal. 433; Codrington *v.* Johnstone, 1 Beav. 520: Allen *v.* Elderkin, 62 Wis. 627; Richards *v.* Knight, 78 Iowa, 69. In the last case it was held that foreclosure did not divest the tenant's right to the crop, if it was matured, although still unsevered from the soil.

or the order of confirmation, where such an order is necessary to give validity to the deed.[1] But the contrary has been ruled in Pennsylvania and Ohio.[2] A sale under a judgment would probably have the same effect on emblements as a sale under a lien theory mortgage in the same State.[3]]

[1] Beckman *v.* Sikes, 35 Kan. 120; s. c. 10 Pac. Rep. 592; Allen *v.* Elderkin, 62 Wis. 627; s. c. 22 N. W. Rep. 842; Downard *v.* Groff, 40 Iowa, 597; Reily *v.* Carter, 75 Miss. 798; s. c. 23 So. Rep. 435; Richards *v.* Knight, 78 Iowa, 69; s. c. 42 N. W. Rep. 584.

[2] Bittinger *v.* Baker, 29 Penn. St. 66, overruling the cases of Sallade *v.* James, 6 Penn. St. 144, and Groff *v.* Levan, 16 Penn. St. 179; Cassilly *v.* Rhodes, 12 Ohio, 88.

[3] See Bittinger *v.* Baker, 29 Penn. St. 66.

CHAPTER VIII.

ESTATES FOR LIFE — WASTE.

§ 270. Tenant must not commit waste.
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272. English and American rules differ.
273. Waste in cutting trees — Timber trees.
274. Rule in the United States.
275. Clearing wild lands.
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293. Acts of God, etc. — Accident.
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308. Injunction, when not granted.
309. Rule governing the granting of injunctions.
310. Injunction and damages.
311. Statutory power to authorize timber cutting.
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§ 270. **Tenant must not commit Waste.** — Tenants for life as well as for years must not commit *waste*, which is the doing or suffering that to be done upon the premises which essentially injures or impairs the inheritance of the estate occupied by the tenant. This restriction existed at common law in respect to estates in possession of tenants in dower and curtesy, because, as these were created by the law itself, it was thought that the law was bound to protect the reversioner or remainder-man from being thereby injured. But where the estate of the tenant was created by act of the parties, it was held that if the grantor or lessor failed to protect the estate by stipulations in his deed or lease, the law was not bound to supply the omission. To remedy this defect the statute of Marlbridge, 52 Hen. III. c. 23, was passed, whereby "fermors during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm," and were made liable to "yield full damage" for so doing. And it is said "*firmarii* do comprehend all such as hold by lease for life or lives or for years, by deed or without deed."[1]

§ 271. **Waste is either voluntary or permissive,** the one being by some act done which injures the inheritance, the other by omitting some duty which causes an injury to result to the inheritance. To tear a house down is voluntary waste; to suffer it to go to decay for want of necessary repair is permissive. The distinction is important, for the consequences differ.[2] But whatever the act or omission is, in order to constitute waste, it must either diminish the value of the estate, or increase the burdens upon it, or impair the evidence of title of him who has the inheritance.[3]

§ 272. **English and American Rules differ.** — In applying this rule it will be found that many acts which in England would be waste will not be such here, in consequence of the difference in the condition of the two countries. And it often becomes a question for a jury to determine whether a certain

[1] Co. 2 Inst. 144, 145; id. 299; Sackett *v.* Sackett, 8 Pick. 309, 312–315. See Appendix C.

[2] 3 Dane, Abr. 214; 2 Bl. Com. 281.

[3] Huntley *v.* Russell, 13 Q. B. 572, 588; 2 Bl. Com. 281; 3 Dane, Abr. 215; McGregor *v.* Brown, 10 N. Y. 114, 117; Proffit *v.* Henderson, 29 Mo. 325.

act be or be not waste, without referring to a criterion drawn from any other country. The rule as to what constitutes waste is uniform. Its application depends upon the condition and usages of the place where it is to be made.[1]

§ 273. **Waste in cutting Trees — Timber Trees.** — The first branch of the subject, as it is generally treated, relates to felling, lopping, or injuring growing trees upon the premises. The rule of the common law is that to fell timber, to lop it, or to do any act which causes it to decay, is uniformly waste.[2] "Oak, ash, and elm be timber trees in all places;" but hornbeams, hazels, and willows are never timber; and yet if standing in defence or safeguard of the house or land, it would be waste to cut them; as it would be to "stub up" a quickset hedge of white-thorn.[3] The same would be the rule as to shade and ornamental and fruit trees, unless past bearing.[4]

§ 274. **Rule in the United States.** — In the United States, whether cutting of any kind of trees in any particular case is waste, seems to depend upon the question whether the act is such as a prudent farmer would do with his own land, having regard to the land as an inheritance, and whether the doing it would diminish the value of the land as an estate.[5]

§ 275. **Clearing Wild Lands.** — Questions of this kind have frequently arisen in those States where the lands are new

[1] 3 Dane, Abr. 232 ; Pynchon *v.* Stearns, 11 Met. 304 ; Keeler *v.* Eastman, 11 Vt. 293; Jackson *v.* Tibbits, 3 Wend. 341 ; Jackson *v.* Brownson, 7 Johns. 227 ; Walker, Am. Law, 278; Kidd *v.* Lennison, 6 Barb. 9 ; 3 Dane, Abr. 214; Lynn's App., 31 Penn. St. 44 ; Drown *v.* Smith, 52 Me. 141 ; Morehouse *v.* Cotheal, 22 N. J. 521 ; Carr *v.* Carr, 4 Dev. & B. (N. C.) 179.

[2] Co. Lit. 53 *a* ; 2 Bl. Com. 281 ; Taylor, Land. & T. 166

[3] Co. Lit. 53 *a* ; 3 Dane, Abr. 218, 233 ; Tud. Cas. 65 ; Honywood *v.* Honywood, L. R. 18 Eq. 306, limits oak, ash, or elm, as timber, to their being twenty years of age, and not too old to have usable wood in them.

[4] 3 Dane, Abr. 217 ; id. 233 ; Calvert *v.* Rice, 91 Ky. 533 ; s. c. 16 S. W. Rep. 351.

[5] Padelford *v.* Padelford, 7 Pick. 152 ; Jackson *v.* Brownson, 7 Johns. 227 ; Kidd *v.* Dennison, 6 Barb. 9; Crockett *v.* Crockett, 2 Ohio St. 180 ; McCullough *v.* Irvine, 13 Penn. St. 438; Webster *v.* Webster, 33 N. H. 26 ; Givens *v.* McCalmont, 4 Watts, 460 ; Chase *v.* Hazelton, 7 N. H. 171 ; Keeler *v.* Eastman, 11 Vt. 293 ; Shine *v.* Wilcox, 1 Dev. & B. Eq. 631 ; Smith *v.* Poyas, 2 Desaus. 65 ; Hickman *v.* Irvine, 3 Dana, 121 ; Parkins *v.* Coxe, 2 Hayw. 339 (Martin & Hayw. 517). See Phillips *v.* Smith, 14 M. & W. 594, n. to Am. ed. ; Calvert *v.* Rice, 91 Ky. 533; s. c. 34 Am. St. Rep. 240 ; s. c. 16 S. W. Rep. 351.

and covered with forests, and where they cannot be cultivated until cleared of the timber. In such case it seems to be lawful for the tenant to clear the land if it would be in conformity with good husbandry to do so, the question depending upon the custom of farmers, the situation of the country, and the value of the timber. The jury are in each case to determine whether by clearing the lands the tenant has cut so much timber as to injure the inheritance.[1]

§ 276. **Clearing Wild Lands — Who owns the Wood.** — Wood cut by a tenant in clearing the land belongs to him, and he may sell it,[2] though he cannot cut the wood for purposes of sale; it is waste if he does.[3] Nor can the tenant, when sued for cutting and selling timber, recoup or make counter-claim for improvements made by him upon the premises at another time.[4] In applying these rules it has been held in Vermont not to be waste to cut and remove dead or decaying timber in order to clear the land and give the young trees a chance to grow.[5] In Massachusetts, cutting oak trees for fuel is not in itself waste, because of the common usage; though it would be so if they were sold for timber, even if the money was applied to purchase firewood for the use of the tenant.[6] And where land was appendant in its use to, and let with, a furnace, it was held not to be waste to cut wood from the premises to supply the furnace. And the same rule was applied in the case of salt-works upon the premises, where wood was cut to carry on the manufacture.[7] So in Pennsylvania it was held not waste for the mortgagor, though insolvent, to cut and sell

[1] Walker, Am. Law, 278; Jackson *v.* Brownson, 7 Johns. 227; Morehouse *v.* Cotheal, 2 N. J. 521; Keeler *v.* Eastman, 11 Vt. 293; McCullough *v.* Irvine, 13 Penn. St. 438; Hastings *v.* Cruncleton, 3 Yeates, 261; Harder *v.* Harder, 26 Barb. 409; McGregor *v.* Brown, 10 N. Y. 114; Proffitt *v.* Henderson, 29 Mo. 325; Davis *v.* Gilliam, 5 Ired. Eq. 308.

[2] Crockett *v.* Crockett, 2 Ohio St. 180; Davis *v.* Gilliam, *supra*.

[3] Parkins *v.* Coxe, 2 Hayw. 339 (Martin & Hayw. 517); Smith, Land. & T. 192, n. Am. ed.; Chase *v.* Hazelton, 7 N. H. 171; Clemence *v.* Steere, 1 R. I. 272.

[4] Morehouse *v.* Cotheal, 22 N. J. 521; Kidd *v.* Dennison, 6 Barb. 9.

[5] Keeler *v.* Eastman, 11 Vt. 293.

[6] Padelford *v.* Padelford, 7 Pick. 152; Babb *v.* Perley, 1 Me. 6. So in Rhode Island. Lester *v.* Young, 14 R. I. 579.

[7] Den *v.* Kinney, 2 South. 552; Findlay *v.* Smith, 6 Munf. 134.

timber, and dig and sell coal and minerals; because products of this kind are usually so intended.[1]

§ 277. **Rights of Dowress.** — The right to cut wood, as an incident of dower, is considered *post*, § 487.

§ 278. **Cutting Timber — Windfalls.** — If a tenant cut trees upon leased premises which are excepted in his lease, he is guilty of trespass, but not waste;[2] and if tenant carry away trees that have been blown down, he would be liable for them in trover, but not in waste.[3] But where timber is blown down, the life tenant is absolutely entitled to as much of it as would have been reasonably necessary firewood, and to interest on the proceeds of the sale of the remainder.[4]

§ 279. **Digging Gravel and Clay Pits.** — Another species of waste consists in opening gravel pits in the land, and digging and selling gravel therefrom, or digging up and selling the soil or clay, or digging clay and making it into bricks for sale; for a tenant for life may neither dig clay nor cut wood upon land for the purpose of making bricks for sale.[5] But if digging and selling gravel, clay, etc., from pits in the land has been the usual mode of improving the same, it would not be waste to continue to do so in pits already opened.[6]

§ 280. **Mines.** — To open lands to search for mines, unless mines are expressly demised with the lands, would be waste; so it would be to open new mines, unless the demise includes them.[7] But if the mines are already opened when the tenant takes the estate, it is not waste to continue to work them even to exhaustion. It is but taking the accruing profits of the soil.[8] Nor would it be waste to open new shafts or pits

[1] Angier *v.* Agnew, 98 Penn. St. 587.

[2] 1 Cruise, Dig. 116.

[3] Shult *v.* Barker, 12 S. & R. 272.

[4] Stonebraker *v.* Zollickoffer, 52 Md. 154.

[5] Huntley *v.* Russell, 13 Q. B. 572, 591 ; Taylor, Land. & T. 164 ; Livingston *v.* Reynolds, 2 Hill, 157 ; Co. Lit. 53 *b* ; Tud. Cas. 65.

[6] Huntley *v.* Russell, 13 Q. B. 591 ; Knight *v.* Mosely, Amb. 176 ; Tud. Cas. 65 ; and see Angier *v.* Agnew, 98 Penn. St. 587.

[7] Co. Lit. 53 *b*; 2 Bl. Com. 282 ; Com. Dig. "Waste," D. 4 ; Saunders's Case, 5 Rep. 12 ; Stoughton *v.* Leigh, 1 Taunt. 402, 410 ; Darcy *v.* Askwith, Hob. 234 ; Viner *v.* Vaughan, 2 Beav. 466.

[8] 2 Bl. Com. 282 ; Neel *v.* Neel, 19 Penn. St. 324 ; Taylor, Land. & T. 165 ; Stoughton *v.* Leigh, 1 Taunt. 410.

to follow the same vein.[1] And this right he may sell to others. The persons thus entitled may mine and sell the mineral, and for this purpose may make new openings, build railroads, and supply all ordinary facilities for carrying on the business. But the improvements thus made become the property of the reversioner upon the termination of the life estate.[2]

§ 281. **Salt Wells.** — The same principle applies to salt-works. If there is an existing salt-well on the premises and a manufactory of salt, it would not be waste to dig a new salt-well in connection with it.[3]

§ 282. **Waste from Mode of Cultivation.** — Waste may be committed by the manner in which land is managed in the way of culture. And in England, the early cases at least adopt a very stringent rule, holding it waste to change one kind of land to another, as wood or meadow or pasture into arable land, and the like. And one ground upon which this is held is, that changing the description of lands might endanger the evidence of ownership.[4]

§ 283. **Good Husbandry the Test in this Country.** — But in this country, no such change in the mode of culture would, of itself, be waste. The question would depend upon whether it

[1] Clavering *v.* Clavering, 2 P. Wms. 388; Findlay *v.* Smith, 6 Munf. 134; Crouch *v.* Puryear, 1 Rand. 258; Billings *v.* Taylor, 10 Pick. 460; Coates *v.* Cheever, 1 Cow. 460. There is a tendency in the courts of Pennsylvania to extend the right of lessees to open new mines without subjecting themselves to the consequences of waste, where the lands leased are chiefly valuable for the minerals they contain. See Smith, Land. & T. 192, 193, Am. ed., n. And see Angier *v.* Agnew, 98 Penn. St. 587.

[2] Irwin *v.* Covode, 24 Penn. St. 162; Lynn's App., 31 Penn. St. 44; Kier *v.* Peterson, 41 Penn. St. 357; Sayers *v.* Hoskinson, 110 Penn. St. 473; s. c. 1 Atl. Rep. 308.

[3] Findlay *v.* Smith, 6 Munf. 134; Kier *v.* Peterson, 41 Penn. St. 357. This case presented a novel question under the application of the principle of the text. The defendant leased to the plaintiff the right to bore salt-wells for the plaintiff's business, and to manufacture salt thereon for an indefinite period of time, paying therefor every twelfth barrel of salt manufactured. After a while petroleum began to rise in the wells, in connection with the salt water, and, being valuable, both parties claimed the right to take it. It was held that the property in the petroleum remained in the lessor, to be accounted for by the lessee, if used or appropriated by him.

[4] 2 Bl. Com. 282; 3 Dane, Abr. 218; Com. Dig. "Waste," D. 4; Darcy *v.* Askwith, Hob. 234 *a*; Co. Lit. 53 *b*.

was in conformity with the rules of good husbandry or not, and would injure the inheritance.[1] Local usage has frequently been held to govern.[2]

§ 284. **Instances of Bad Husbandry.** — But it would be waste to suffer pastures to become overgrown with brush;[3] or to impoverish fields by constant tillage from year to year;[4] or to remove the manure made upon the premises in the ordinary course of husbandry;[5] or to suffer a bank to become ruinous, whereby the water of the sea or a river overflows and spoils meadow ground.[6] But where in altering the course of a creek, which was in itself an act of good husbandry, the water had the effect to destroy growing timber, which had not been anticipated, it was held not to be an act of waste.[7]

§ 285. **Altering Buildings — When Waste.** — At common law, by the early English authorities, removing the real fixtures from a building, or adapting it to a new purpose by any radical change in the freehold, even by throwing two chambers into one, or *e converso*, would be waste.[8] But the rule is now more liberal both in England and in this country.[9] The test is now confined to the question, does the act essentially injure the inheritance as it will come to the reversioner? and this is a question for the jury.[10]

§ 286. **Altering Buildings — When Waste, continued.** — The

[1] 3 Dane, Abr. 219; Crockett *v.* Crockett, 2 Ohio St. 180; Taylor, Land. & T. 170, 171; Clemence *v.* teere, 1 R. I. 272; Keeler *v.* Eastman, 11 Vt. 293; Phillips *v.* Smith, 14 M. & W. 594; McGregor *v.* Brown, 10 N. Y. 114, 118; Proffitt *v.* Henderson, 29 Mo. 325.

[2] Jones *v.* Whitehead, 1 Parsons, 304; Smith, Land. & T. 192, *n.* Am. ed.; Sarles *v.* Sarles, 3 Sand. Ch. 601; Webster *v.* Webster, 33 N. H. 18, 25.

[3] Clemence *v.* Steere, 1 R. I. 272; Windon *v.* Stewart, 43 W. Va. 711; s. c. 28 S. E. Rep. 776.

[4] Sarles *v.* Sarles, 3 Sandf. Ch. 601.

[5] Lewis *v.* Jones, 17 Penn. St. 262.

[6] Com. Dig. "Waste," D. 4; Co. Lit. 53 *b*.

[7] Jackson *v.* Andrew, 18 Johns. 431.

[8] 3 Dane, Abr. 215; Com. Dig. "Waste," D. 3; Taylor, Land. & T. 166; London *v.* Greyme, Cro. Jac. 181; Co. Lit. 53 *a*, n. 344; 2 Rolle, Abr. 815.

[9] Young *v.* Spencer, 10 B. & C. 145; Jackson *v.* Tibbits, 3 Wend. 341.

[10] Young *v.* Spencer, 10 B. & C. 145; Doe *v.* Burlington, 5 B. & Ad. 507; Smith, Land. & T. 194, n.; Jackson *v.* Andrew, 18 Johns. 431; Hasty *v.* Wheeler, 12 Me. 434; Phillips *v.* Smith, 14 M. & W. Am. ed. 589, 595, n.; Webster *v.* Webster, 33 N. H. 25; McGregor *v.* Brown, 10 N. Y. 114, 118.

law seems to be correctly stated by the chancellor in Winship *v.* Pitts. "It is not waste for the tenant to erect a new edifice upon the demised premises, provided it can be done without destroying or materially injuring the buildings, or other improvements already existing thereon. He has no right to pull down valuable buildings, or to make improvements or alterations which will materially or permanently change the nature of the property so as to render it impossible for him to restore the same premises, substantially, at the expiration of the term. It cannot be waste, to make new erections upon the demised premises which may be removed at the end of the term without much inconvenience, leaving the property in the same situation it was at the commencement of the tenancy, and the materials of which new buildings, if left on the premises, would more than compensate the owner of the reversion for the expenses of their removal."[1]

§ 287. **Real Fixtures erected by Tenant, Subject of Waste.** — Whether a tenant can commit waste upon structures erected by himself on the demised premises depends upon his right to remove them, — upon whether they are real or personal fixtures. The distinction has already been discussed.[2] Obviously, the tenant is not liable for the destruction of such fixtures as he may lawfully remove. But if he erect a new house, he is as much obliged to keep it in repair as he would be if it had been standing when he entered.[3]

§ 288. **Allowing Houses and Fences to become ruinous.** — A tenant is clearly liable if he permits a house or fences on the premises to go to decay, when by the exercise of reasonable diligence he might prevent it. And, as a general rule, whatever would be waste to houses or fences in England, would be in this country.[4]

§ 289. **Wear and Tear.** — A tenant from year to year is not held liable to make good the mere wear and tear of the prem-

[1] Winship *v.* Pitts, 3 Paige, 262. And see Beers *v.* St. John, 16 Conn. 322; Sarles *v.* Sarles, 3 Sand. Ch. 601; Clemence *v.* Steere, 1 R. I. 272. In this case, a tenant tore down a dilapidated barn which was in danger of falling, and it was held not to be waste.

[2] *Ante*, §§ 5, 6.

[3] 3 Dane, Abr. 215.

[4] 3 Dane, Abr. 214; id. 239; Smith, Land. & T. 196.

ises.[1] He is only obliged to keep the house wind and water tight.[2]

§ 290. **Wear and Tear, continued.** — But that does not seem to be the measure of what is required of a tenant for years or for life,[3] who, in this country, is bound to make all ordinary repairs, whether there is such a stipulation in the lease or not.[4] And this he must do though there be no timber upon the premises,[5] though it is said that in such case, if tenant be in by lease, the lessor must provide timber necessary for the repairs, if there be no fault in the lessee.[6] But while he is bound to use ordinary care to prevent buildings going to decay, he is not bound to expend extraordinary sums for that purpose.[7]

§ 291. **Where Buildings are ruinous at Commencement of Term.** — If a house is uncovered or ruinous when the tenant takes possession, he will not be made liable by suffering it to remain so, though if there is timber upon the premises he may use it for repairing the house.[8] It would be a double waste to let a house go to decay, and then cut timber to repair it.

§ 292. **Fences — English Rule differs from American.** — In England the tenant must keep fences in as good repair as he finds them, and he would not be at liberty to cut timber to build fences where there were none before,[9] though a different rule would be applied in this country, making it depend upon the usages of the place and the rules of good husbandry there.[10]

§ 293. **Acts of God, etc. — Accident.** — Though a tenant is liable for acts of waste done upon the premises by a stranger, he will not be for what is done by the act of God, public enemies, or the law. But if a house be unroofed by a tempest,

[1] Torriano *v.* Young, 6 Car. & P. 8.

[2] Auworth *v.* Johnson, 5 Car. & P. 239.

[3] Smith, Land. & T. 195.

[4] Long *v.* Fitzsimmons, 1 Watts & S. 530; Windon *v.* Stewart, 43 W. Va. 711; s. c. 28 S. E. Rep. 776.

[5] Co. Lit. 53 *a.*

[6] Com. Dig. "Estate by Grant," E. 3.

[7] Wilson *v.* Edmonds, 24 N. H. 517; Hughes *v.* Vanstone, 24 Mo. App. 637; Wood on Land. & T. § 368.

[8] 3 Dane, Abr. 221, 222; Co. Lit. 53, 54 *b*; Clemence *v.* Steere, 1 R. I. 272.

[9] Co. Lit. 53 *b*; 3 Dane, Abr. 219.

[10] See Windon *v.* Stewart, 43 W. Va. 711; s. c. 28 S. E. Rep. 776.

the tenant may not suffer it to remain so.[1] And where a surveyor of highways, under authority of law, opened gravel pits within the demised premises, the tenant was held not liable for suffering it to be done.[2] Nor is the tenant liable where the premises are destroyed by accident without his fault.[3]

§ 294. **Tenant liable for Acts of Strangers.** — With the above exceptions, the tenant is bound to protect the premises from waste, even against strangers, or is responsible to the reversioner for the same, and may have his remedy against the wrongdoer.[4] But in Michigan, if a tenant for life has conveyed away his estate, he will not be liable for any waste committed by his grantee, although such tenant for life be a tenant in dower.[5]

§ 295. **Remedy for Waste.** — The common law provided an action of waste only in the cases of dower and curtesy, and it was by the statutes of Marlbridge and Gloucester that the action of waste was extended to tenants for life and years by grant or demise.[6]

§ 296. **Tenant may curtail Liability by his Lease.** — Lessors may grant leases "without impeachment of waste." This will relieve the tenant of liability for permissive waste, but not for malicious waste.[7]

§ 297. **Two Remedies at Common Law.** — At common law there were two remedies for waste, one by a writ of prohibition, where it had been threatened, the other by a *writ of waste* for waste actually done, in which the tenant was obliged to pay the value of the waste, and a keeper was appointed to prevent future waste.

[1] Co. Lit. 54 *a*; 3 Dane, Abr. 216, 221; Smith, Land. & T. 195, n.; Pollard *v.* Shaaffer, 1 Dall. 210.

[2] Huntley *v.* Russell, 13 Q. B. 572, 591.

[3] United States *v.* Bostwick, 94 U. S. 53; Earle *v.* Argobast, 180 Penn. St. 409 But it should be borne in mind that the tenant may, by covenant to repair, assume a liability which the law would not impose on him in the absence of such covenant. See *post*, § 686.

[4] Co. Lit. 54 *a*; Doctor & Stud. 112; Fay *v.* Brewer, 3 Pick. 203; 3 Dane, Abr. 225; Co. 2d Inst. 145; Wood *v.* Griffin, 46 N. H. 230, 237, 240; Cook *v.* Champl. Tr. Co., 1 Denio, 91; Attersol *v.* Stevens, 1 Taunt. 183, 198; Austin *v.* Huds. Riv. R. R., 25 N. Y. 334.

[5] Beers *v.* Beers, 21 Mich. 464.

[6] 2 Bl. Com. 283; Co. 2d Inst. 299; Chipman *v.* Emeric, 3 Cal. 273. Under these statutes treble damages were recovered.

[7] 2 Bl. Com. 283; Pyne *v.* Dor, 1 T. R. 55. See *post*, § 305.

§ 298. **Parties to the Action of Waste.** — At common law, an action of waste lies against the original tenant in dower or by curtesy even after he or she has assigned the estate; but it will not lie against the assignee even for waste done after the assignment.[1] But no one could maintain it but the one who had an immediate estate of inheritance upon the determination of the estate in dower or curtesy without any interposing vested freehold.[2]

§ 299. **The Action of Waste depends upon Privity** between the parties, so that if the reversioner grant away his reversion after waste done, no action in this form will lie, and the same would be the effect if the reversioner had died and it had descended to his heirs. So if, after committing waste, the tenant for life died, no action lay against his executors.[3]

§ 300. **Illustrations.** — In one case a widow had assigned her interest and the reversioner had assigned his. Her assignee committed waste. It was held that the assignee of the reversion could not have waste or an action on the case in the nature of waste against her, because of the want of privity between them.[4] But, in such a case, the heir of a reversioner might have waste, or case in the nature of waste, against her after the assignment of her estate. So might the assignee of the heir of the reversioner against the assignee of the life estate. In the first of these cases there was a privity of action at common law; in the other there was a privity of estate. But between the assignee of the reversion of the life estate and the tenant in dower there is no privity at all. And the same is true in respect to tenants by curtesy.[5] *

* Note. — This apparent solecism of creating a privity in estate between the grantees of two persons who had originally no privity in estate between themselves, as above stated, between the assignee of the heir of a reversioner and the assignee of a dowress, is to be ascribed to the statute of Gloucester, and is not the creature of the common law, "so as," in the words of Coke, "in this point our act [the statute of Gloucester] is introductory of a new law." 2 Inst. 301 ; Park, Dower, 359 ; Com. Dig. "Waste," c. 4 ; Co. Lit. 54 *a*.

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[1] Co. 2d Inst. 300 ; see Beers *v.* Beers, 21 Mich. 464.

[2] Com. Dig. "Waste," c. 2 ; Co. Lit. 218 *b*, n. 122.

[3] Co. Lit. 53 *b*.

[4] Foot *v.* Dickinson, 2 Met. 611.

[5] Bates *v.* Shraeder, 13 Johns. 260 ; Walker's Case, 3 Rep. 23; Foot *v.* Dickinson, 2 Met. 611; Co. 2d Inst. 301.

§ 301. **Technical Difficulties removed by Statute.** — In several of the States the difficulties as to the forms and parties to the action of waste, arising from the technical rules of the common law, have been obviated by statute, in some cases giving the heir of the reversioner an action for waste done in the lifetime of the ancestor.[1] In others, actions for waste done survive against the executors, etc., of the tenant.[2]

§ 302. **Action on the Case.** — And it would seem that an action upon the case in the nature of waste, for waste actually done, is a common law remedy, which any one having a reversionary interest may maintain to recover the actual damages done, against any one who does the injury, whether lessee or stranger.[3] In Maine, a reversioner may have waste to recover the place wasted and damages, or case in the nature of waste, and recover damages, but not both.[4]

§ 303. **Remedy of Remainder-man or Reversioner where Waste will not lie.** — Though, as has been seen, the interposition of a freehold in remainder between the estate of the tenant committing waste, and the remainder or reversion in fee, would prevent the owner of the latter from maintaining waste as the law stood, yet he is not without right or remedy in respect to timber cut upon the premises. The property in that is considered as being in him, and he may seize it, or bring trover for its conversion, or replevy it, or bring trespass *de bonis* for the taking of it. Nor does it matter whether the timber is cut by a stranger or by the tenant himself, since the tenant cannot convey any interest in it when severed.[5] If a tenant

[1] *Massachusetts*, Pub. Stat. 1882, c. 179, § 1; *Maine*, Rev. Stat. 1883, p. 789, § 1; *New York*, Civ. Code, § 1652; *Wisconsin*, S. & B. Stat. 1889, § 3174; *Michigan*, Howell's Stat. 1882, § 7943; *Iowa*, Code 1897, § 4308; *Missouri*, Rev. Stat. 1889, § 6403; *Delaware*, Rev. Stat. 1893, p. 665, § 5; *New Jersey*, Gen. Laws 1896, p. 3749, § 6; *Kentucky*, Stat. 1894, § 2330.

[2] *Maine*, Rev. Stat. 1883, p. 789, § 4; *Massachusetts*, Pub. Stat. 1882, c. 179, § 5.

[3] Chase *v.* Hazelton, 7 N. H. 171, 175. And such action by lessor against lessee is not affected by a subsequent conveyance of the reversion to the latter. Dickinson *v.* Mayor, 48 Md. 583. In Iowa, owner of land may have *trespass* for acts of permanent injury done to it while in possession of a tenant, the statute having done away the distinction between trespass and case. Brown *v.* Bridges, 31 Iowa, 138, 145.

[4] Stetson *v.* Day, 51 Me. 434.

[5] Lewis Bowles's Case, 11 Rep. 82; Berry *v.* Heard, Cro. Car. 242; Richard-

for life cut timber and sell it, he is thereby a wrongdoer, and cannot claim the interest upon such sale, on the ground that it was a part of the income of the estate. The reversioner in such case may have trover for the conversion of the timber, or an action for money had and received, if the tenant shall have sold it.[1] But if the trees are cut by a stranger, both the tenant and reversioner may have actions therefor, — trespass by the tenant, and case by the reversioner. The trees, however, when severed from the freehold, become the absolute and sole property of the reversioner, and trespass will lie in his favor against any one who removes them, even though it be the tenant himself, as the property in chattels carries with it possession as against a wrongdoer.[2] Nor would the tenant for life have any better rights in this respect, though the trees cut had grown upon what was pasture-land when he took possession, or the natural growth of wood upon the land, before the determination of the life estate, would become equal in value to the trees which he had cut. Nor could he set off against the reversioner's claim for damages what he had paid to procure firewood from the same.[3] This principle applies not only to the timber cut, but to materials of buildings severed from the inheritance, and the produce of mines wrongfully severed.[4]

§ 304. **Remedy by Injunction.** — But if tenant for life has the next existing estate of inheritance, subject to intermediate contingent remainders in tail, a court of chancery would restrain his cutting timber, otherwise he would have an inducement to cut to the injury of the remainder-man, as he would be entitled to the timber, his being the only existing estate of inheritance.[5] No one, however, whose interest is that of a contingent remainder, or executory devise, can maintain an action at law against a tenant for life, for committing waste upon the premises.[6]

son *v.* York, 14 Me. 216; Bulkley *v.* Dolbeare, 7 Conn. 232; Mooers *v.* Wait, 3 Wend. 104.

[1] Seagram *v.* Knight, L. R. 2 Ch. App. 628; Jones *v.* Hoar, 5 Pick. 285.

[2] Lane *v.* Thompson, 43 N. H. 320.

[3] Phillips *v.* Allen, 7 Allen, 115; Clark *v.* Holden, 7 Gray, 8, 11.

[4] Tud. Cas. 67; Uvedall *v.* Uvedall, 2 Rolle, Abr. 119, pt. 3.

[5] Williams *v.* Bolton, 3 P. Wms. 268, n.

[6] Hunt *v.* Hall, 37 Me. 363, 366.

§ 305. **A Tenant "without Impeachment of Waste,"** whether for life or years, may open new mines, fell timber, and claim as his own that which has been blown down, though he has no property in the timber while standing, nor can he sell it to another to cut after his death, nor delegate any right to a third party to do so. But if he underlets, his tenant will have the same exemption as himself.[1] But such a tenant is not at liberty to commit wilful and malicious waste, and courts of chancery will interpose, by injunction, to restrain its commission, or compel him to repair the waste, if actually committed.[2] The custom of leasing in this way does not seem to have obtained in this country.[3]

§ 306. **Remedies now in use.** — [The technical action of waste has fallen into disuse in this country, the equitable remedy by injunction and an action on the case, in which actual damages are awarded, taking its place.[4]]

§ 307. **Injunction now the Usual Remedy.** — In the present state of the law, however, the most usual remedy resorted to by a reversioner against a tenant for life or years in respect to waste is by application to chancery to obtain an injunction restraining him from committing it. This power is incident to courts of chancery, and is conferred by statute upon other courts in some cases. It may be applied in many cases where the party seeking relief could not sustain an action of waste, as where an estate for life intervenes between the estate of the tenant and that of the estate of inheritance, in favor of the intermediate remainder-man, as well as the remainder-man in fee.[5] And this remedy may be applied, although

[1] 2 Bl. Com. 283, n.; Pyne *v.* Dor, 1 T. R. 55; Cholmeley *v.* Paxton, 3 Bing. 207; 1 Cruise, Dig. 128; Tud. Cas. 7; Bowles's Case, 11 Rep. 83.

[2] Marker *v.* Marker, 4 Eng. L. & Eq. 95; Vane *v.* Lord Barnard, 2 Vern. 738.

[3] 4 Kent, Com. 78, n.

[4] Smith, Land. & T. 197, n.; McCullough *v.* Irvine, 13 Penn. St. 438; 4 Kent, Com. 81; Wms. Real Prop. 24; and see Sackett *v.* Sackett, 8 Pick. 309; Moore *v.* Ellsworth, 3 Conn. 483; Randall *v.* Cleaveland, 6 Conn. 328; Smith *v.* Follansbee, 13 Me. 273; Parker *v.* Chambliss, 12 Ga. 235; Woodward *v.* Gates, 38 Ga. 205. For a full explanation of actions on the case in the nature of waste, and when they will lie, see Greene *v.* Cole, 2 Saund. 252 and n. 7; Countess of Shrewsbury's Case, 5 Rep. 13; Herne *v.* Bambow, 4 Taunt. 764; Gibson *v.* Wells, 1 B. & P. N. R. 290; Moore *v.* Townshend, 33 N. J. L. 284.

[5] Jones *v.* Hill, 1 Moore, 100; Laussat's Fonbl. Eq. 3, n.; id. 52, n.; Tracy *v.* Tracy, 1 Vern. 23; Mollineaux *v.* Powell, 3 P. Wms. 268, n. F.; Kane *v.* Van-

another is provided by statute.[1] So it may often be applied where tenants hold without impeachment of waste, if they exercise this power in an unreasonable and unconscionable manner.[2]

§ 308. **Injunction, where not granted.** — Nor will this remedy be granted except in cases of technical waste. It will not be in cases of mere trespass, and it must moreover be for an injury which will be irreparable, and not to be compensated in damages.[3] But it will be granted if material waste is threatened though the injury actually done be trifling.[4]

§ 309. **Rule governing the granting of Injunctions.** — In one case the court lay down the following rule as to cases where courts of equity will interpose to prevent injuries to real estate, — one which seems to be in conformity with the principles acted upon by courts in other States. If there is a privity of estate between the party applying for the injunction and him who is doing or about to do the act, such as exists between tenant for life or years and the reversioner, it is not necessary that the act should work irreparable injury to induce the court to grant it. But if the parties are strangers in respect to the estate, or are claimants adverse to each other, the court will require evidence that the injury threatened will be irreparable, before they will interpose to restrain it by injunction. And this, whether the act threatened be waste or trespass.[5] Nor will an injunction to stay waste be granted where the right is doubtful.[6]

§ 310. **Injunction and Damages.** — [Upon a bill to stay waste,

derburgh, 1 Johns. Ch. 11 ; Story, Eq. Jur. § 913. But held, that remainder-man for life could not have a bill to enjoin the tenant of the previous estate. Mayo *v.* Feaster, 2 McCord, Ch. 137.

[1] Harris *v.* Thomas, 1 Hen. & M. 18. *Contra*, Cutting *v.* Carter, 4 Hen. & M. 424; Poindexter *v.* Henderson, Walker, 176.

[2] Kane *v.* Vanderburgh, 1 Johns. Ch. 11 ; 2 Bl. Com. 283 ; Tud. Cas. 68, 69.

[3] Attaquin *v.* Fish, 5 Met. 140 ; Atkins *v.* Chilson, 7 Met. 398 ; Poindexter *v.* Henderson, Walker, 176 ; Leighton *v.* Leighton, 32 Me. 399.

[4] Livingston *v.* Reynolds, 26 Wend. 115 ; Loudon *v.* Warfield, 5 J. J. Marsh. 196 ; Rodgers *v.* Rodgers, 11 Barb. 595 ; White Water Canal *v.* Comegys, 2 Ind. 469.

[5] Georges Creek Co. *v.* Detmold, 1 Md. Ch. Dec. 371. See Atkins *v.* Chilson, 7 Met. 398 ; Poindexter *v.* Henderson, Walker, 176.

[6] Storm *v.* Mann, 4 Johns. Ch. 21 ; Field *v.* Jackson, 2 Dick. 599.

the court may proceed to do complete justice between the parties by awarding damages for past waste.[1]

§ 311. **Statutory Power** is sometimes given to courts of equity in this country to authorize tenants to cut timber which would be injured by standing, and invest the proceeds for the reversioner.[2]]

§ 312. **Repairing the Damage.** — Finally, if the tenant commit waste, but repair the damage before action brought, he will not be liable.[3]

[1] Story, Eq. Jur. §§ 517, 518, 917; Tud. Cas. 68; Watson *v.* Hunter, 5 Johns. Ch. 169.

[2] Mass. Pub. St. c. 126, § 12; Me. R. S. 1883, p. 109. And see Story's Eq. Jur. § 919.

[3] Co. Lit. 53 *a*; Jackson *v.* Andrew, 18 Johns. 431.

CHAPTER IX.

ESTATES BY CURTESY.

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§ 313. **Estate defined.** — An estate by the curtesy is that to which a husband is entitled, upon the death of the wife, in the lands or tenements of which she was seised in possession, in fee-simple or in tail, during their coverture, provided they have had lawful issue born alive, which might have been capable of inheriting the estate. It is a freehold estate for the term of his natural life.[1]

§ 314. **Curtesy by Equity.** — Equity, following the law, holds that where the wife is *cestui que trust* in fee-simple or in tail, the husband is entitled to curtesy in the trust estate, in the same manner as in the legal estate.[2]

§ 315. **Origin of the Estate.** — Curtesy is not of feudal origin,[3] although it has been a well-known estate at the common law, with well-defined qualities and incidents, from a period as early probably as the reign of Henry I., if not before. Of late, however, by reason of the prevalence of marriage settlements in England, it has, practically, become infrequent there.[4]

§ 316. **Curtesy in the United States.** — In this country it was adopted as a common law estate. It still exists in its common law form by express statute, or by statutory recognition, [in several of the States of this country; in others it exists in a modified form; and in others it has been abolished by the adoption of provisions inconsistent therewith. In a note at the end of this chapter an attempt has been made to collate the existing laws on the subject in this country.]

§ 317. **The Essential Requisites** to entitle a husband to curtesy are: (1) marriage; (2) seisin of wife during coverture; (3) birth of a child alive during the life of the wife; (4) death of the wife.

§ 318. **The Marriage** must be a lawful one, though if it be a voidable one it will give curtesy, unless it is actually avoided during the life of the wife. It cannot be declared void afterwards.[5]

[1] Lit. § 35 ; Co. Lit. 30 *a* ; 2 Bl. Com. 126 ; Adair *v.* Lott, 3 Hill, 182.
[2] Watts *v.* Ball, 1 P. Wms. 108 ; Co. Lit. 29 *a*, n. 165 ; Tud. Cas. 38.
[3] Wright, Ten. 192, 193, 194 ; 2 Bl. Com. 126 and n., 127.
[4] Wms. Real Prop. 187.
[5] 2 Burns, Eccl. Law, 501.

§ 319. **The Seisin of the Wife** must, in general terms, be of an estate of inheritance. But this may be either a legal or an equitable one. [In this respect courts of equity follow the law, where the wife has an estate of inheritance in enjoyment, which in equity answers to a seisin at law of legal estates in possession.[1]] And the receipt of the rents and profits by the wife as such *cestui que trust* during coverture is ordinarily sufficient seisin in equity to give a husband curtesy.[2] [But the husband will not take curtesy where the estate is limited to the "sole and separate" use of the wife, and the intention of the settlor from the terms of the settlement is otherwise clear that the marital rights of the husband shall not attach,[3] even though the husband himself created the estate in the wife.[4]]

§ 320. **Curtesy in Equitable Estates and Money.** — The right is extended to equities of redemption, contingent uses, and moneys directed to be laid out in lands for the benefit of the wife. Equity in such cases treats the money as land.[5] Thus, where an executor sold the land of a female heir under such circumstances that she might confirm the sale and take the money, or avoid it and take the land, and she preferred the money, her husband was held entitled to curtesy out of the money, she having died before it was paid over.[6] So

[1] Roper, Hus. & Wife, 18, 20; Watts *v.* Ball, 1 P. Wms. 109; Robison *v.* Codman, 1 Sumn. 121; Morgan *v.* Morgan, 5 Madd. 408; Hearle *v.* Greenbank, 3 Atk. 695, 717; Sweetapple *v.* Bindon, 2 Vern. 537, n. 3; Davis *v.* Mason, 1 Pet. 503; Ogden *v.* Ogden, 60 Ark. 70; s. c. 28 S. W. Rep. 796.

[2] Morgan *v.* Morgan, 5 Madd. 408; 4 Kent, Com. 31; Tud. Cas. 39; Frey *v.* Allen, 9 App. D. C. 400.

[3] Hearle *v.* Greenbank, 3 Atk. 717; Sweetapple *v.* Bindon, 2 Vern. 537, n.; Pool *v.* Blakie, 53 Ill. 495; Stokes *v.* McKibbin, 13 Penn. St. 267; Bennett *v.* Davis, 2 P. Wms. 316; Hutchins *v.* Commercial Bank, 91 Va. 68; s. c. 20 S. E. Rep. 950; Stewart *v.* Ross, 50 Miss. 776; Haight *v.* Hall, 74 Wis. 152; s. c. 42 N. W. Rep. 109; s. c. 17 Am. St. Rep. 122; Bennet *v.* Davis, 2 P. Wms. 316; Cochran *v.* O'Hern, 4 Watts & S. 95; Hearle *v.* Greenbank, 3 Atk. 695; Rigler *v.* Cloud, 14 Penn. St. 361; 1 Roper, Hus. & Wife, 37–39. See *post*, § 1404. But in Tennessee the rule is different, and express words are necessary to cut off the husband's curtesy. Carter *v.* Dale, 3 Lea, 710.

[4] Rigler *v.* Cloud, 14 Penn. St. 361.

[5] Davis *v.* Mason, 1 Pet. 503; Sweetapple *v.* Bindon, 2 Vern. 536; Fletcher *v.* Ashburner, 1 Bro. C. C. 497, 499; 3 Prest. Abs. 381; Hart *v.* Chase, 46 Conn. 207; Robinson *v.* Lakeman, 28 Mo. App. 135.

[6] Houghton *v.* Hapgood, 13 Pick. 154.

where, in order to make partition, the share of a wife, tenant in common, was sold, the husband had curtesy in the money.[1]

§ 321. **Wife's Equitable Separate Estate.** — [But although a husband may never take an estate by the curtesy initiate by reason of the limitation to the sole and separate use of the wife, yet if there is nothing further to indicate the intention of the settlor to bar curtesy, or if a power of disposition be given to the wife and she fail to make use of it, upon the death of the wife curtesy will become consummate.[2]

§ 322. **Determinable Fees — When Curtesy allowed.** — Where the wife's estate, although a fee, comes to an end upon her death by the terms of the instrument creating it, *proprio vigore*, curtesy will survive. Thus] though the issue in tail fail by death of the child in the wife's lifetime, whereby her estate at her death is at an end, the husband takes curtesy, it being a right incident to such an estate.[3] So, where the devise was to a daughter and her heirs, and if she died without issue, the whole estate was to be sold and the proceeds paid to her brothers and sisters, and she married and had a child, who died, and then she died without issue, her husband had curtesy.[4]

§ 323. **Whatever defeats Wife's Estate defeats Curtesy.** — But where the wife's estate is upon condition subsequent, requiring the entry of the grantor or his heirs in order to defeat it upon breach of the condition, this entry would so far retroact, that the grantor would be in of his original estate, and all intermediate estates and rights would have been defeated, including, of course, the husband's curtesy. The estate would be

[1] Clepper *v.* Livergood, 5 Watts, 113; Forbes *v.* Smith, 5 Ired. Eq. 369. So where the devise was to a daughter and her heirs, with power of sale in the executor, and he sold, the husband had curtesy in the money. Dunscomb *v.* Dunscomb, 1 Johns. Ch. 508.

[2] Tillinghast *v.* Coggeshall, 7 R. I. 383; Robie *v.* Chapman, 59 N. H. 41; Pool *v.* Blakie, 53 Ill. 495; Hutchings *v.* Commercial Bank, 91 Va. 68; s. c. 20 S. E. Rep. 950; Nightingale *v.* Hidden, 7 R. I. 115; Payne *v.* Payne, 11 B. Mon. 138; Morgan *v.* Morgan, 5 Madd. 408; Clancy, Rights of Wom. 193, 194. But see Cochran *v.* O'Hern, 4 Watts & S. 95; Clark *v.* Clark, 24 Barb. 581.

[3] Paine's Case, 8 Rep. 34; Holden *v.* Wells, 18 R. I. 802; s. c. 31 Atl. Rep. 265; 1 Roper, Hus. & Wife, 37–39.

[4] Buchanan *v.* Sheffer, 2 Yeates, 374; Hay *v.* Mayer, 8 Watts, 203; Taliaferro *v.* Burwell, 4 Call, 321. The same principle is laid down in Buckworth *v.* Thirkell, 3 B. & P. 652, n.

defeated *ab initio*. So if the seisin of the wife were tortious, as gained by disseisin, or under a defective title, and had been defeated by an eviction under a judgment upon a title paramount, the same consequence would follow. So where a daughter becomes, during coverture, seised as heir to her father, and the mother has her dower set out of the same land, it defeats the seisin of the daughter in the lands so set out, and with it her husband's curtesy, since the widow's seisin, when consummated by the setting out of her dower, is considered as anterior to that of the daughter as heir, and of course converts the latter into that of a reversion. But if the widow die in the lifetime of the daughter and her husband, the latter will have curtesy by the actual seisin thereby conferred upon his wife.[1] And it may be laid down as a general proposition that "any circumstance which would have defeated or determined the estate of the wife, if living, will, of course, put an end to the estate by curtesy."[2]

§ 324. **Estates on Conditional Limitation ending upon Wife's Death.** — [Recurring to the proposition laid down in section 322, *ante*, we are brought to the discussion of an estate upon conditional limitation which comes to an end upon the death of the wife. A conditional limitation was not known to the common law, but originated] in the doctrine of shifting uses or executory devises. It implies the creation of two estates by one and the same deed or devise, in such a manner that the first will, upon the happening of a certain contingent event, be defeated and brought to an end before its natural determination, and the second estate thereupon, at once, and without any act or thing done to give it effect, come in and take the place of the first estate. The first of these estates may be a fee, and the event that determines it and passes it over to the third party may be the dying of the first taker without issue, or before a certain age, or both; and the question then has been, whether the husband or wife of such first taker is thereby defeated of what till that event had been a right incident to an existing estate, or might enjoy it, although as to the deceased the estate was determined by death.

[1] 1 Roper, Hus. Wife, 36; id. 42, 43; Co. Lit. 241, Butler's note, 170.
[2] 1 Atk. Conv. 255.

Lord Mansfield, in one case, was of opinion that the husband in such a case was entitled to curtesy;[1] and Best, C. J., was of a like opinion in a case of dower.[2] But the doctrine does not find favor with Mr. Park in his work on Dower;[3] and the opinion of Lord Mansfield is impugned by Mr. Sugden.[4] And the English court held, in a case where a conveyance was made to such uses as C D should appoint, and in default of, and until appointment, to the use of C D in fee, who was married, that by the execution of this appointment in the lifetime of C D, his estate was defeated, and with it his wife's right of dower.[5] Mr. Burton alludes to the circumstance, that in one class of the English cases above cited the estate was defeated by the death of the first taker, and in the other by the act of the first taker in his lifetime. But apparently concluding that this can hardly reconcile these decisions, he adds: "Such and so subtle appears the distinction, on the ground of positive law, between these decisions."[6] Gibson, C. J., undertakes to explain away these difficulties, in the case of Evans *v.* Evans, although it is nearly identical with one cited from the New York reports below, in which the court came to an opposite conclusion, and he seems to overlook the fact that there can be no limitation of a fee upon a fee at common law, and that the questions, in most of the cases, do not arise under limitations at common law.

§ 325. **Executory Devises and Springing Uses not subject to Common law Rules.** — The case of Evans *v.* Evans, though one of dower, was decided upon analogy to cases of curtesy, and the reasoning of the court applies to the one as well as to the other. The devise in that case was to A and B, their heirs and assigns; but should either die without having lawful issue living at his (her) death, then the estate of one so dying to vest in the survivor and heirs forever. It was held that upon A dying without living issue, his widow (her husband) was

[1] Buckworth *v.* Thirkell, 3 B. & P 652, n.
[2] Moody *v.* King, 2 Bing. 447.
[3] Park, Dower, 177–183.
[4] Sugd. Powers, vol. ii. p. 31.
[5] Ray *v.* Pung, 5 B. & A. 561.
[6] Burton, Real Prop. 145. See *post*, § 246 and cases cited.

entitled to dower (curtesy) out of the estate.[1] The court — Gibson, C. J. — declared that none of the text-writers, except Mr. Preston, had suggested the true solution of the difficulty in such cases in giving curtesy or dower to the husband or wife of the deceased person whose entire estate was determined by the death; and held the solution to be, that estates determinable *by executory devise* and *springing use*, are not governed by common law principles.[2] It was accordingly held that a limitation to A and her heirs, with a limitation over to N upon A's dying without issue, was such an estate in A as gave her husband the right of curtesy therein.[3]

§ 326. **The Rule restated.** — If, therefore, the estate of the wife be an estate of inheritance, determinable by a limitation which operates to defeat her estate at common law, the right of curtesy, it would seem, is gone. But if the limitation over be by the way of springing use or executory devise which takes effect at her decease, thereby defeating or determining her original estate before its natural expiration, and substituting a new one in its place, which could not be done at common law, the seisin and estate which she had of the fee simple or tail will give the husband curtesy.[4] And the doctrine of this paragraph is now recognized as the law in such cases in New York.[5]

§ 327. **Curtesy in Joint Estates.** — If the wife be one of two or more joint tenants, though she is actually seised, yet if she die, living her co-tenant, her husband cannot claim curtesy, from the very nature of the estate, which becomes at her death the absolute and several estate of the survivor.[6] [But if the wife be a tenant in common, the husband will have curtesy;

[1] Evans *v.* Evans, 9 Penn. St. 190.

[2] Buckworth *v.* Thirkell, 3 B. & P. 652, n.; Moody *v.* King, 2 Bing. 447. See also Barker *v.* Barker, 2 Sim. 249.

[3] Grout *v.* Townshend, 2 Hill, 554.

[4] For the discussion of the points above referred to, the reader is referred to 1 Roper, Hus. & Wife, 36–42; 4 Kent, Com. 33 and n.; 3 Prest. Abs. 372, 384; Co. Lit. 241 *a*, Butler's note, 170; and a critical article of much learning and nice discrimination in 11 Am. Jur. 55; Wright *v.* Herron, 6 Rich. Eq. 406; Grout *v.* Townshend, 2 Hill, 554; Thornton *v.* Krepps, 37 Penn. St. 391; Jones *v.* Hughes, 27 Gratt. 560; Mason *v.* Johnson, 47 Md. 347.

[5] Hatfield *v.* Sneden, 54 N. Y. 280.

[6] Lit. § 45; Tud. Cas. 38.

and possession by a co-tenant, being the seisin of all the tenants, is sufficient.[1]]

§ 328. **The Wife's Seisin.** — The husband's curtesy is in many respects but a continuation of the estate of the wife, though it is regarded more in the nature of an estate by descent than purchase.[2] For this and other reasons it is held that the wife must have been actually seised of the estate during coverture, though the former strictness, in this respect, has been relaxed in England and still more so in several of the United States.[3] Though it is laid down in numerous cases that in order to entitle a husband to curtesy, the wife must have had actual seisin,[4] and that if she was never seised in fact during coverture, the husband has no right to her land after her decease,[5] it is probable that this is limited to those cases where her title is incomplete, at common law, without a formal entry, as in the case of an heir or devisee, and does not extend to cases where the wife acquires title by deed, the effect of which is to pass a legal seisin and title to the land.[6] Nor is an entry necessary, in case of a descent of land in Missouri, to entitle the husband of the heir to curtesy out of the same.[7] So in Mississippi, a constructive seisin of a wife is sufficient, as where the land is vacant, or in the hands of a tenant for years, or at sufferance.

§ 329. **When Entry necessary to give Curtesy.** — Still, it is the general rule of law in both countries that, if the estate be such that an entry is necessary to preserve it, there must be such an entry during coverture, in order to give the husband curtesy.[8] It is said that the chief reason for requiring, in

[1] Sterling *v.* Penlington, 2 Eq. Cas. Abr. 730; Wass *v.* Bucknam, 38 Me. 356; Rhodes *v.* Robie, 9 App. D. C. 305.

[2] Roper, Hus. & Wife, 35; Watson *v.* Watson, 13 Conn. 83.

[3] Perkins, §§ 457, 470; Stearns, Real Act. 283; Doctor & Stud. 145; Tud. Cas. 40; 1 Roper, Hus. & Wife, 7; 4 Kent, Com. 30, n.; Wass *v.* Bucknam, 38 Me. 356.

[4] Orr *v.* Hollidays, 9 B. Mon. 59; Stinebaugh *v.* Wisdom, 13 B. Mon. 467; Fulton *v.* Johnson, 24 W. Va. 95; Carpenter *v.* Garrett, 75 Va. 129.

[5] Petty *v.* Malier, 15 B. Mon. 591.

[6] Adair *v.* Lott, 3 Hill, 182; Jackson *v.* Johnson, 5 Cowen, 74, 98. See also Wass *v.* Bucknam, 38 Me. 360; Ferguson *v.* Tweedy, 43 N. Y. 543.

[7] Harvey *v.* Wickham, 23 Mo. 115; Reaume *v.* Chambers, 22 Mo. 36, 54; Stephens *v.* Hume, 25 Mo. 349.

[8] Adams *v.* Logan, 6 Mon. 175; Mercer *v.* Selden, 1 How. 37; Neely *v.* Butler, 10 B. Mon. 48.

this country, the husband to take the lands of the wife into actual possession, is to strengthen her title to them, and protect them from adverse claim, and from hostile possession, which might, by its continuance, endanger her right. And this may as well be done by the husband's vendee as by himself.[1] If, therefore, a woman be disseised and then marry, the husband must regain the seisin by making an entry during coverture.[2]

§ 330. **Entry — Wife taking Title by Descent.** — In England, where land descends to the wife, the husband must enter to gain sufficient seisin to give him curtesy.[3] But in this country, as a general proposition, the seisin in law which, in the case just supposed, is thrown upon the heir if the ancestor die seised, would be sufficient to give her husband curtesy without actual entry made.[4] And in Pennsylvania, Connecticut, and Ohio, a right of entry on the part of the wife would be a sufficient seisin, although the premises were in the adverse possession of another.[5]

§ 331. **Entry — Wild Lands.** — And it may be laid down as a general proposition that in this country, if lands are vacant or wild lands, ownership draws to it the legal seisin without any actual seisin being taken.[6] But the husband of a wife who is entitled to a pre-emptive right in public land is not entitled to curtesy in the same.[7] But in Kentucky, actual

[1] Vanarsdall *v.* Fauntleroy, 7 B. Mon. 401.

[2] Perkins, § 458; 1 Roper, Hus. & Wife, 8; Den *v.* Demarest, 21 N. J. 525.

[3] Prest. Abs. 381; Co. Lit. 29 *a*.

[4] Day *v.* Cochran, 24 Miss. 261; Adair *v.* Lett, 3 Hill, 182; Jackson *v.* Johnson, 5 Cow. 74; Chew *v.* Commissioners, etc., 5 Rawle, 160; Stephens *v.* Hume, 25 Mo. 349; Mass. Pub. Stat. c. 173, § 3; Martin *v.* Trail, 142 Mo. 85; s. c. 43 S. W. Rep. 655; Mercer *v.* Selden, 1 How. 37; Davis *v.* Mason, 1 Pet. 503; Luttrell *v.* Reynolds, 63 Ark. 254; s. c. 37 S. W. Rep. 1051; Mettler *v.* Miller, 129 Ill. 630; s. c. 22 N. E. Rep. 529. But see cases cited *ante*, § 328.

[5] Stoolfoos *v.* Jenkins, 8 S. & R. 167; Bush *v.* Bradley, 4 Day, 298; Kline *v.* Beebe, 6 Conn. 494; Borland *v.* Marshall, 2 Ohio, N. S. 308; Mitchell *v.* Ryan, 3 Ohio St. 377; Merritt *v.* Horne, 5 Ohio St. 307.

[6] Jackson *v.* Sellick, 8 Johns. 262; Davis *v.* Mason, 1 Pet. 503; Weir *v.* Tate, 4 Ired. Eq. 264; Barr *v.* Galloway, 1 McLean, 476; Pierce *v.* Wanett, 10 Ired. 446; McCorry *v.* King, 3 Humph. 267; Wells *v.* Thompson, 13 Ala. 793; Guion *v.* Anderson, 8 Humph. 298, 324; Day *v.* Cochran, 24 Miss. 261; Reaume *v.* Chambers, 22 Mo. 36. But see Vanarsdall *v.* Fauntleroy, 7 B. Mon. 401.

[7] McDaniel *v.* Grace, 15 Ark. 465. But this is because the pre-emption right is not an estate but a right to acquire an estate.

seisin is requisite in order to give curtesy even of wild lands;[1] though the receipt of the rents and profits by the wife will be sufficient.[2]

§ 332. **Decree of Court.** — A decree of a court of competent jurisdiction, settling the right of husband and wife to the wife's land, would be deemed, so far as his right to curtesy is concerned, equivalent to actual seisin.[3]

§ 333. **Entry by Husband's Grantee.** — If the grantee of the husband enter upon the land of the wife, and hold possession under such grant, he will have the rights of a tenant by curtesy against the heirs of the wife during the life of the husband, although the latter never had actual possession of the premises.[4]

§ 334. **The Possession by a Tenant** for years or at will of the wife is a sufficient seisin in the husband, and the same will be true though the estate descend to the wife subject to a tenancy for years in another, and the wife die before receiving rent; the possession of the tenant in such cases being regarded as the possession of the owner of the inheritance.[5]

§ 335. **No Curtesy in a Reversionary Estate dependent upon a Freehold.** — But if the estate of the wife be one in reversion or remainder, subject to a prior freehold estate in another, her constructive seisin of such reversion will not entitle her husband to curtesy, unless the prior freehold determine during coverture.[6] Thus, if a grantor by deed convey lands to an-

[1] Neely *v.* Butler, 10 B. Mon. 48; Stinebaugh *v.* Wisdom, 13 B. Mon. 467, overruling the dicta of the Supreme Court in Davis *v.* Mason, 1 Pet. 503; Welch *v.* Chandler, 13 B. Mon. 420.

[2] Powell *v.* Gossom, 18 B. Mon. 179.

[3] Ellsworth *v.* Cook, 8 Paige, 643; Seim *v.* O'Grady, 42 W. Va. 77; s. c. 24 S. E. Rep. 994, which was a decree confirming a purchase made by the wife at judicial sale.

[4] Vanarsdall *v.* Fauntleroy, 7 B. Mon. 401.

[5] Tayloe *v.* Gould, 10 Barb. 388; Mackey *v.* Proctor, 12 B. Mon. 433; De Grey *v.* Richardson, 3 Atk. 469; Jackson *v.* Johnson, 5 Cow. 74; Lowry *v.* Steele, 4 Ham. 170; Green *v.* Liter, 8 Cranch, 245; Powell *v.* Gossom, 18 B. Mon. 179; Day *v.* Cochran, 24 Miss. 261; Carter *v.* Williams, 8 Ired. Eq. 177.

[6] Adams *v.* Logan, 6 Mon. 175; Stoddard *v.* Gibbs, 1 Sumn. 263; 2 Bl. Com. 127; Co. Lit. 29 *a*; 3 Prest. Abs. 382; Lowry *v.* Steele, 4 Ham. 170; Chew *v.* Comm'rs, 5 Rawle, 160; Hitner *v.* Ege, 23 Penn. St. 305; Orford *v.* Benton, 36 N. H. 395; Planters' Bk. *v.* Davis, 31 Ala. 626; Malone *v.* McLaurin, 40 Miss. 161; Ferguson *v.* Tweedy, 43 N. Y. 543; Shores *v.* Carley, 8 Allen, 426; Doe *v.* Rivers,

other until he can, out of the rents and profits, pay the grantor's debts, the grantee will have a freehold estate, because of the uncertain duration, though it might be obvious that, in all human probability, the rents of the estate would cancel these debts in ten years. But if this were done by devise to his executors, for instance, until his debts should be paid, it would give but a chattel interest to the executors. If, therefore, the heir of the grantor, in the former case, were a married woman who should die before the estate of the grantee had determined by payment of the debts, her husband would not have curtesy; while if she were heir of the devisor, as in the latter case, he would.[1]

§ 336. **Incorporeal Hereditaments.** — A husband is entitled to curtesy in the incorporeal hereditaments of the wife, as to which actual seisin is impossible, and only enjoyment, or seisin in law, is necessary, as in the case of a rent.[2]

§ 337. **No Curtesy in Lands held in Trust.** — [But the wife must be seised beneficially to give her husband curtesy; therefore he will have no curtesy in land of which she is seised merely as trustee.[3] Therefore] where a woman, before marriage, contracted by parol to convey her land for a price which was paid her, and the purchaser was put into possession, and remained so after her marriage and during her life, it was held that the husband could not claim curtesy,[4] for she was but the trustee of the legal title. Nor would it make any difference in the above case of seisin by the wife as trustee, that she should become entitled to a reversion of the equitable estate after the equitable life estate of another, if she dies before such intermediate estate is determined.[5] [The converse of the foregoing proposition is also true; so that if

7 T. R. 276; Carpenter *v.* Garrett, 75 Va. 129; Bogy *v.* Roberts, 48 Ark. 17; s. c. 2 S. W. Rep. 186; Baker *v.* Flournoy, 58 Ala. 650; Martin *v.* Trail, 142 Mo. 85; s. c. 43 S. W. Rep. 655.

[1] Manning's Case, 8 Rep. 96.

[2] Davis *v.* Mason, 1 Pet. 507; Co. Lit. 29 *a*; Jackson *v.* Sellick, 8 Johns. 262.

[3] Chew *v.* Comm'rs, 5 Rawle, 160; Norton *v.* McDevit, 122 N. C. 755; s. c. 30 S. E. Rep. 24.

[4] Welsh *v.* Chandler, 13 B. Mon. 420. In this case there was a deed given by husband and wife, but the court held the doctrine of the text, without reference to the deed.

[5] Chew *v.* Comm'rs, 5 Rawle, 160.

a married woman be seised of land under a parol gift, so that the statute of limitations is set running against the donor, curtesy will be defeated by a re-entry of the donor after the death of the donee before the statute has run.[1]]

§ 338. **Conveyance on Eve of Marriage.** — Where a woman, on the eve of her marriage, conveyed her real estate without the consent of her contemplated husband, it was held to be a fraud upon his rights and void as to him.[2]

§ 339. **Merger sometimes results in giving Curtesy.** — Sometimes, however, the owner of a reversion may, by its being united with the life estate that precedes it, acquire such an immediate seisin as to raise the right of curtesy. But this may depend upon whether it is by deed or devise. Thus, if a life estate and the reversion in fee come together in one person by deed, the reversion will merge the life estate, even though a contingent remainder were limited to intervene between them; the life estate merging in the reversion defeats the contingent remainder at common law by destroying the freehold particular estate which supported it. If, therefore, the person in whom the two unite is a *feme covert*, her husband might claim curtesy. But if there be a devise to one for life, with a contingent remainder in fee, there would be a reversion expectant upon the failure of the contingent remainder which would descend to the testator's heir-at-law. And if she happened to be the devisee for life, and the doctrine of merger above explained were to apply, her reversion would merge her life estate and destroy the contingent remainder. But as this would be giving the effect to a will to destroy itself, the law in such case will keep the life estate and reversion distinct, and the husband of such devisee cannot claim curtesy. Still, if such devisee for life were to acquire such reversion by any other means than by the will which created the several estates for life and in remainder, it would merge the life estate, and the effect would be to give the husband of the tenant curtesy therein.[3] The same rule

[1] Brown *v.* Watkins, 98 Tenn. 454; s. c. 40 S. W. Rep. 480.

[2] Hobbs *v.* Blandford, 7 T. B. Mon. 469. See also Spencer *v.* Spencer, 3 Jones, Eq. 404; Williams *v.* Carle, 10 N. J. Eq. 543. See *post*, § 2228; Chandler *v.* Hollingsworth, 3 Del. Ch. 99.

[3] Plunket *v.* Holmes, 1 Lev. 11; Kent *v.* Hartpoole, 3 Keble, 731; 1 Cruise,

as applies in case of devise will, however, apply where a tenant for life becomes such, and also a reversioner in fee with an interposed contingent remainder, by the same deed.[1]

§ 340. **Child must be capable of inheriting.** — Curtesy being considered a continuance of the inheritance, it is not only necessary that the wife should have had a living child, but it must have been such a child as by possibility might have inherited the estate. Thus, if the inheritance be in tail male, and the child be a female, it would not be sufficient.[2]

§ 341. **Time of Child's Birth — Its Death.** — It is immaterial whether the child is born before or after the wife acquires her estate, if, had it lived, it would have inherited that estate; and it matters not though it die before she acquires the estate, so far as the husband's right to curtesy is concerned.[3] So, where adverse possession was taken in the life of the wife during coverture, and she then had issue and died, her husband was entitled to curtesy.[4] And where a man married a widow who already had a son, and had by her a child, he was held entitled to curtesy in her estate against any claim of such prior son.[5]

§ 342. **Must be born alive during Mother's Life.** — But in most of the States where curtesy is allowed, great strictness is required in the proof that the child was actually born alive in the lifetime of the mother. In many States the necessity of a child being born is dispensed with by statute.[6] The maxim of the common law on the subject of the birth of such child is *mortuus exitus non est exitus*, and if the mother die

Dig. 149 ; 1 Roper, Hus. & Wife, 10 ; 2 Crabb, Real Prop. 113 ; Doe *v.* Scudamore, 2 B. & P. 294 ; Boothby *v.* Vernon, 2 Eq. Cas. Abr. 728 ; s. c. 9 Mod. 147.

[1] Hooker *v.* Hooker, Cas. temp. Hardw. 13.

[2] Co. Lit. 29 *b* ; Day *v.* Cochran, 24 Miss. 261 ; Heath *v.* White, 5 Conn. 228, 236 ; Barker *v.* Barker, 2 Sim. 249 ; Sumner *v.* Partridge, 2 Atk. 47.

[3] Co. Lit. 29 *b*; Jackson *v.* Johnson, 5 Cow. 74; 2 Bl. Com. 128 ; Comer *v.* Chamberlain, 6 Allen, 166 ; Hunter *v.* Whitworth, 9 Ala. 965.

[4] Jackson *v.* Johnson, 5 Cow. 74 ; Guion *v.* Anderson, 8 Humph. 307.

[5] Heath *v.* White, 5 Conn. 236. But the law is otherwise by statute in Michigan. Hathon *v.* Lyon, 2 Mich. 93.

[6] 1 Cruise, Dig. 143, n. ; Dunlop's Laws, p. 510 ; Lancaster Co. Bank *v.* Stauffer, 19 Penn. St. 398 ; Co. Lit. 29 *b* ; Dubs *v.* Dubs, 31 Penn. St. 154 ; Rouse Estate *v.* Directors of the Poor, 169 Penn. St. 116 ; s. c. 32 Atl. Rep. 541. And see the statutes of the several States.

before the *exitus* of the child, and that be by the Cæsarean operation, though it be born alive, it would not be sufficient to give the father curtesy.[1]

§ 343. **Curtesy initiate, consummate.** — As soon as a child is born, the husband's right to curtesy is said to be initiate, and is consummate only upon the wife's death. The freehold is thereupon, *ipso facto*, in him, nor would any disclaimer of his, short of an actual release, prevent its vesting in him instantly upon the death of the wife. It devolves upon him as the estate of the ancestor does upon the heir.[2]

§ 344. **Estate exists independent of Children's Needs.** — His estate thus acquired is one for life in his own right, and, although it is said to have had its origin in the husband's obligation to support the children, he is as much entitled to it when they do not need support as when they do, and where they do not as where they do live any length of time, if actually born alive.[3]

§ 345. **Nature of Estate by the Curtesy Initiate.** — By the marriage the husband acquires an estate of freehold in the inheritance of the wife, in her right, but he is not sole seised during coverture, and after issue had, though he is tenant by the curtesy, he is jointly seised with the wife.[4] The court of New Hampshire regard this seisin and possession of the husband by right of curtesy initiate, as so entirely his own, that if he is disseised during coverture, neither his wife nor her heirs would be affected by a possession under such disseisin, however long continued, so long as the husband was alive, and that they would have twenty years after his death in which to regain their seisin by entry or action, in the same way as a reversioner who had an estate expectant upon an estate for life.[5] The court of Tennessee, on the contrary, hold that such disseisin and possession run against both husband

[1] Co. Lit. 29 *b*; Marsellis *v.* Thalhimer, 2 Paige, 42.

[2] 2 Bl. Com. 128; Watson *v.* Watson, 13 Conn. 83; Witham *v.* Perkins, 2 Me. 400; Walk. Am. Law, 329

[3] Heath *v.* White, 5 Conn. 235.

[4] Weisinger *v.* Murphy, 2 Head, 674; Guion *v.* Anderson, 8 Humph. 298, 325; Butterfield *v.* Beall, 3 Ind. 203; Jackson *v.* Johnson, 5 Cow. 74, 95; Junction Railroad *v.* Harris, 9 Ind. 184; McCorry *v.* King's Heirs, 3 Humph. 267; Melvin *v.* Prop'rs, 16 Pick. 161; *post*, § 520. See also Wass *v.* Bucknam, 38 Me. 356.

[5] Foster *v.* Marshall, 22 N. H. 491.

and wife, and would bar the title of both as well as of her heirs, except for the saving in the statute in favor of *femes covert*, etc., which gives a certain time in which to bring an action after such disability is removed. The same rule applies as to her heirs, in case the husband survives her, they having three years, the time given to persons under disabilities after the same are removed, in which to sue for the land. And the same doctrine is maintained in Maine and Massachusetts.[1] *

§ 346. **Estate is subject to Prior Incumbrances.** — Curtesy being considered a continuance of the wife's inheritance, the husband takes the estate subject to the same incumbrances under which she held it.[2]

§ 347. **Curtesy liable for Husband's Debts.** — And this right initiate, as well as the estate consummate, is liable to be taken for his debts; nor can he defeat the right by any disclaimer of his right to curtesy.[3] Nor will equity interfere in

* Note. — The court of New Hampshire refer to Jackson *v.* Johnson, 5 Cowen, 74, and Heath *v.* White, 5 Conn. 228, as having been "decided in accordance with our views, and we think upon sounder principles than the cases in Massachusetts to which we have referred." But it is to be noticed that in the first of these cases the disseisin occurred before the husband's right to curtesy had become initiate by the birth of a child, and the court were divided in opinion. And in the other, the alleged adverse possession of the tenant did not begin until after the death of the wife, and the husband was the only one entitled to the possession or liable to be disseised, the heir being a mere reversioner, and, of course, not affected by any possession adverse to the husband as tenant for life. The foregoing cases do not relate to the effect of a conveyance by the husband. By the statute 32 Hen. VIII. c. 28, which is a part of the common law of Massachusetts, if the husband alone conveys his wife's land, it shall not work a discontinuance of her estate, but she or her heirs, at his decease, may enter upon the same as if no such conveyance had been made. Bruce *v.* Wood, 1 Met. 542, 544. And see Miller *v.* Shackleford, 4 Dana, 277; 2 Kent, Com. 133, note; *post*, § 913.

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[1] Weisinger *v.* Murphy, Guion *v.* Anderson, McCorry *v.* King's Heirs, *supra*; Mellus *v.* Snowman, 21 Me. 201; Melvin *v.* Prop'rs, 16 Pick. 161; Bruce *v.* Wood, 1 Met. 542. See *post*, § 913; Coe *v.* Wolcottville Mg. Co., 35 Conn. 175; Watson *v.* Watson, 10 Conn. 75, 88. But in North Carolina the statute of limitations will not run against either husband or wife as long as curtesy remains initiate. Jones *v.* Coffey, 109 N. C. 515; s. c. 14 S. E. Rep. 84.

[2] 2 Crabb, Real Prop. 119; 1 Roper, Hus. & Wife, 35.

[3] Burd *v.* Dansdale, 2 Binn. 80; Watson *v.* Watson, 13 Conn. 83; Canby *v.* Porter, 12 Ohio, 79; Van Duzer *v.* Van Duzer, 6 Paige, 366; Litchfield *v.* Cudworth, 15 Pick. 23; Roberts *v.* Whiting, 16 Mass. 186; Mattocks *v.* Stearns, 9 Vt. 326; Lancaster Bk. *v.* Stauffer, 10 Penn. St. 398; Day *v.* Cochran, 24 Miss. 261, 275; Bozarth *v.* Sargent, 128 Ill. 95; s. c. 21 N. E. Rep. 218; Deming *v.* Miles,

favor of wife or children to prevent his creditors levying upon his estate.[1]

§ 348. **Effect of Alienage.** — It was once deemed an insuperable disability to the right of curtesy that the husband was an alien, the law not lending him its aid to obtain an estate which, when obtained, it might at once take from him.[2]

§ 349. **How Curtesy may be forfeited.** — There are various ways in which a husband may forfeit his estate to curtesy, and in some of the States this is a consequence of a divorce *a vinculo*, obtained against him by his wife for his fault, for his estate can never become consummate by the death of his *wife*, if the woman whom he married cease to be wife during her life. This has been so held in Connecticut, Massachusetts, New York, Indiana, Vermont, Kentucky, Delaware, Illinois, and Missouri, in cases decided in their courts.[3]

§ 350. **Forfeiture by Feoffment.** — By the English law, after the statute Westm. 2, c. 24, tenant by curtesy would forfeit his estate by making a feoffment of the lands.[4] And the same was held to be the effect in Maine and New Jersey, of a deed of conveyance in fee.[5] But elsewhere the husband's attempted conveyance in fee will convey his rights without working a forfeiture.[6] And in South Carolina, where a hus-

35 Neb. 739; s. c. 53 N. W. Rep. 665; McCaskill *v.* McCormac, 99 N. C. 548; s. c. 6 S. E. Rep. 423. But query, how far it is liable for debts in Missouri. Harvey *v.* Wickham, 23 Mo. 117. And in Massachusetts it is held that the statutes permitting the wife to cut off the husband's curtesy with his consent are inconsistent with a right in creditors to levy thereon. Silsby *v.* Bullock, 10 Allen, 94; Staples *v.* Brown, 13 Allen, 64. See also the exemption statutes of the several States.

[1] Van Duzer *v.* Van Duzer, 6 Paige, 366.

[2] Foss *v.* Crisp, 20 Pick. 121; Reese *v.* Waters, 4 Watts & S. 145. But this disability is now done away with in most of the States. See note on the subject, § 132.

[3] Bishop, Mar. & Div. § 666. See also 1 Greenl. Cruise, 150; Wheeler *v.* Hotchkiss, 10 Conn. 225; Arrington *v.* Arrington, 102 N. C. 491 s. c. 9 S. E. Rep. 200; Renwick *v.* Renwick, 10 Paige, 420; Schuster *v.* Schuster, 93 Mo. 438; s. c. 6 S. W. Rep. 259; Moran *v.* Somes, 154 Mass. 200; s. c. 28 N. E. Rep. 152; Emmert *v.* Hays, 89 Ill. 11.

[4] 2d Inst. 309.

[5] French *v.* Rollins, 21 Me. 372; 4 Kent, Com. 84.

[6] McKee *v.* Pfout, 3 Dall. 486; Flagg *v.* Bean, 25 N. H. 49; Dennett *v.* Dennett, 40 N. H. 498; Meraman *v.* Caldwell, 8 B. Mon. 32; Miller *v.* Miller, Meigs, 484; Butterfield *v.* Beall, 3 Ind. 203; Junction Railroad *v.* Harris, 9 Ind. 184; Reagle *v.* Reagle, 179 Penn. St. 89; s. c. 36 Atl. Rep. 191; Arnold *v.* Bunnell, 42 W. Va. 473; s. c. 26 S. E. Rep. 359.

band conveyed his wife's land in fee, it was held that the grantee thereby acquired the husband's rights, and that she could not, during the life of her husband, recover possession of the same, and that she had seven years after his death in which to bring an action for the same. So in Tennessee.[1] [The Married Women's Separate Property Acts in various States have had the effect of destroying the right to curtesy initiate as a vested estate, so that no estate can vest until the right becomes consummate.[2]

§ 351. **Curtesy initiate a Vested Estate.** — Curtesy having become initiate upon the birth of issue capable of inheriting, is now a vested estate which cannot be impaired by any subsequent act of the legislature.[3] Before birth of issue the legislature may alter or abolish the husband's rights.[4] So where the statute abolishes curtesy initiate, postponing the vesting of the estate until it becomes consummate, the rights of the husband are subject to statutory change at any time before the death of the wife.[5]

§ 352. **Curtesy an Inseparable Incident of Wife's Legal Estates.** — While, as we have seen, a wife may be given an equitable estate so limited as to bar curtesy, yet this right of the husband is a necessary incident to all the wife's legal estates of inheritance (except those which she holds in trust); and any limitation of a legal estate to a woman which attempts to prevent the right to curtesy from attaching is void.[6]]

§ 353. **Curtesy subject to same Duties, etc., as Estates for Life.** — Tenants by curtesy hold their estates subject to the duties, limitations, and obligations which attach to those of

[1] Munnerlyn *v.* Munnerlyn, 2 Brev. 2; Miller *v.* Miller, Meigs, 484. See also Boykin *v.* Rain, 28 Ala. 332.

[2] Hayden *v.* Peirce, 165 Mass. 359; s. c. 43 N. E. Rep. 119; Clark *v.* Clark, 24 Barb. 581; Albany County Savings Bank *v.* McCarty, 149 N. Y. 71; s. c. 43 N. E. Rep. 427.

[3] Jackson *v.* Jackson, 144 Ill. 274; s. c. 33 N. E. Rep. 51. But curtesy having become initiate, the legislature may exempt it from liability for debts of the husband, created after passage of the act. Hitz *v.* Nat. Met. Bk., 111 U. S. 722.

[4] Hathon *v.* Lyon, 2 Mich. 93; McNeer *v.* McNeer, 142 Ill. 388; s. c. 32 N. E. Rep. 681.

[5] Thurber *v.* Townsend, 22 N. Y. 517; Albany County Savings Bank *v.* McCarty, 149 N. Y. 71; s. c. 43 N. E. Rep. 427.

[6] Mildmay's Case, 6 Rep. 40; Clancy, Rights of Wom. 191; Mullany *v* Mullany, 4 N. J. Eq. 16.

ordinary tenants for life, for which reference may be had to the chapter which treats of estates for life.

§ 354. **Upon the Death of the Wife**, the husband is at once in as tenant by the curtesy, without having to resort to a preliminary form to consummate his title to the same.

NOTE. — Statutory provisions affecting curtesy : —

Alabama. The husband has a right to the use for life of the realty of his wife dying intestate, excepting only such property as may be conveyed to an active trustee for her benefit, unless he has been divested of all control over it by a decree of a court of chancery. The birth of issue not necessary. Code 1896, §§ 2534, 2530.

Arkansas. The husband's marital right to the wife's separate property during her life excluded, but if she die intestate and there be issue of the marriage born alive, his right of curtesy attaches as at common law. Mansfield's Digest, § 4624 ; Dig. Stat. 1894, § 4945, note *c* ; Neelly *v.* Lancaster, 47 Ark. 175 ; s. c. 1 S. W. Rep. 66.

California. Estate by curtesy not allowed. 2 Deering's Codes and Stat. § 173.

Colorado. Estate by curtesy abolished. Mills' Ann. Stat. 1891, § 1524.

Connecticut. The right to curtesy exists (Sill *v.* White, 62 Conn. 430) if the parties were married prior to April 20, 1877. Curtesy abolished as to parties married since that date, and other provisions substituted. Gen. Stat. 1888, § 623.

Delaware. The common law estate by curtesy preserved. Laws 1893, p. 641.

Florida. Curtesy abolished. Wife dying, issue living, husband takes a child's part. Wife dying childless, husband sole heir. Rev. Stat. 1892, § 1820.

Georgia. There is no tenancy by curtesy. Code 1895, § 3094.

Idaho. No estate is allowed the husband as tenant by curtesy. Rev. Stat. 1887, § 2506.

Illinois. Estate by curtesy abolished. Rev. Stat. 1895, p. 549, § 1. Husband has dower in both the legal and equitable estates of his deceased wife.

Indiana. Estate by curtesy abolished. Rev. Stat. 1894, § 2639.

Iowa. Estate by curtesy abolished. Code 1897, § 3366.

Kansas. Estate by curtesy abolished. 2 Gen. Stat. 1897, p. 561, § 26.

Kentucky. Common law estate by curtesy changed into an estate for life of one third of all the real estate of which his deceased wife, or any one for her use, was seised of an estate in fee-simple during coverture. Stat. 1894, § 2132. Forfeited by abandoning wife and living in adultery. § 2133.

Louisiana. The community system exists, and there is no estate by curtesy. Rev. Civil Code 1889, articles 915, 916.

Maine. Estate by curtesy abolished by act of 1895, c. 137, which act takes effect as to parties then married, Jan. 1, 1897.

Maryland. Tenant by curtesy entitled for life to lands held by equitable title, but not to the prejudice of any claim for the purchase-money of such lands, or other lien on the same. Pub. Gen. Laws, p. 802, § 6. Forfeited by bigamy, p. 464, § 17.

Massachusetts. The common law estate by curtesy preserved. If no issue is born capable of inheriting, and the wife does not provide otherwise, the husband

has a life estate in one half of the real property of his deceased wife. Pub. Stat. 1882, p. 740, § 1.

Michigan. Estate by curtesy abrogated, unless then vested, by the act of Feb. 13, 1855. Howell's Stat. 1882, § 6295.

Minnesota. Estate by curtesy abolished. Laws of 1875, p. 74.

Mississippi. Estate by curtesy abolished. Code 1892, § 2291.

Missouri. The statutes imply that the estate by curtesy exists. Rev. Stat. 1889, §§ 7132, 8869. The estate recognized by judicial decisions. Soltan *v.* Soltan, 93 Mo. 307; s. c. 6 S. W. Rep. 95. Husband entitled to curtesy in the separate equitable estate of his wife, unless it is provided to the contrary in the deed of settlement. McTigue *v.* McTigue, 116 Mo. 138; s. c. 22 S. W. Rep. 501.

Montana. Estate by curtesy not allowed. Codes and Stat. 1895 (Civil Code), § 257.

Nebraska. "When any married woman, seised in her own right of any estate of inheritance in lands, shall die leaving no issue, the lands shall descend to her surviving husband during his natural lifetime as tenant by curtesy. Provided, that if the wife at her death shall have issue by any former husband to whom the estate might descend, such issue shall take so much of the same as has not come to her as a gift from her surviving husband, discharged from the right of the surviving husband to hold the same as tenant by curtesy: Provided, that if the wife at her death shall have issue by her surviving husband alone, or if she have issue by a former husband and issue also by her surviving husband, then the surviving husband on the death of his wife shall hold as tenant by curtesy only one third interest in the inheritance of his own issue by said deceased wife." Stat. 1893, p. 403, § 29.

Nevada. Estate by curtesy not allowed. Gen. Stat. 1885, § 505.

New Hampshire. The common law estate by curtesy preserved. Pub. Stat. 1891, p. 546, § 9.

New Jersey. Estate by curtesy. 1 Gen. Stat. 1896, p. 1196, § 14.

New York. Estate by curtesy exists. Rev. Stat. 1896, p. 1827, § 20. Not lost by divorce on account of fault of wife. Civil Code, § 1760.

North Carolina. Common law estate by curtesy preserved. Code 1883, § 1838. Barred by adultery, divorce, or abandonment of wife. Teague *v.* Downs, 69 N. C. 280.

North Dakota. Estate by curtesy not allowed. Rev. Code 1895, § 2770.

Ohio. Estate by curtesy abolished. Rev. Stat. 1896, § 4194 *et seq.*

Oregon. Husband has estate by curtesy. The birth of issue not necessary. Hill's Code 1887, § 2983.

Pennsylvania. Husband has estate by curtesy. The birth of issue not necessary. Dig. (P. & L.) 1896, p. 2408. Wife cannot bar by will. pp. 2909–2938.

Rhode Island. Common law estate by curtesy preserved. Gen. Laws 1896, pp. 631, 665, 734, 737.

South Carolina. Estate by curtesy abolished. Rev. Stat. 1893, § 2169.

South Dakota. Estate by curtesy abolished. Stat. 1899, § 4591.

Tennessee. Common law estate by curtesy preserved. Code 1896, § 3679

Texas. Estate by curtesy not allowed. Batts' Civil Stat. 1897, § 1689.

Utah. Estate by curtesy not allowed. Rev. Stat. 1893, § 2832.

Vermont. Common law curtesy preserved. "But if the wife, at her death, leaves issue by a former husband, such estate, or so much thereof as descends to

such issue by a former husband, shall be discharged from the right of the surviving husband to hold the same as tenant by the curtesy." Stat. 1894, § 2542.

Virginia. Common law estate by curtesy preserved. Code 1887, § 2286. Husband has curtesy in trust estates of his wife. § 2429.

Washington. Estate by curtesy abolished. Ballinger's Code and Stat. 1897, § 4495.

West Virginia. Husband has estate by curtesy. The birth of issue not necessary. Code 1891, p. 617, § 15. Husband has curtesy in trust estates. p. 635.

Wisconsin. "The husband on the death of his wife shall hold the lands of which she died seised, and which were not disposed of by her last will and testament, for his life as tenant by the curtesy : provided, that if the wife, at her death, shall leave issue by any former husband, to whom the estate might descend, such issue shall take the same, discharged from the right of the surviving husband to hold the same as tenant by the curtesy." Stat. 1889, § 2180.

Wyoming. Estate by curtesy abolished. Rev. Stat. 1899, § 4858.

CHAPTER X.

DOWER — NATURE AND HISTORY OF DOWER.

§ 355. Dower defined.
356. Nature of dower.
357. Division of subject.
358. *Lex loci* applied to dower.
359. Rule as to time in respect to dower.
360. Inchoate right of dower not a vested interest.

§ 355. **Dower defined.** — Dower is the provision which the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children.[1]

§ 356. **Nature of Dower.** — Dower "is not the result of contract, but a positive institution of the State, founded on reasons of policy."[2] The Magna Charta relieves the widow from the burden of fine and relief, to which heirs and alienees were uniformly subjected by the feudal law, declaring that she shall give nothing for her dower. It then gives her the right to tarry in the chief house of her husband, if not a castle, "by forty days after the death of her husband," which has since been known as her quarantine;[3] and adds, "And for her dower shall be assigned unto her the third part of all the lands of her husband which were his during coverture, except she were endowed of less at the church door."[4]

§ 357. **Division of Subject.** — It is proposed to consider — 1. Of what a widow is dowable. 2. What are the requisites to entitle her to dower. 3. How the right of dower may be lost or barred. 4. How and by whom dower may be assigned, and in what manner its assignment may be enforced. 5. The nature of the interest and estate of a wife and widow in her dower land. 6. Some of the peculiarities as to dower existing in the several States.

[1] Co. Lit. 30 *a*; 2 Bl. Com. 180.
[2] Moore *v.* Mayor, 8 N. Y. 110.
[3] 2 Bl. Com. 135.
[4] 2 Inst. 16.

§ 358. **Lex Loci applied to Dower.** — The law by which the right of dower in any particular case is determined, is that of the place where the subject-matter of the claim is situate. Thus a woman who is married and domiciled in Louisiana is entitled, upon the death of her husband, to dower in lands of which he was seised in Mississippi, although, in the place of her domicil, dower is not recognized by law.[1] So, though a widow domiciled in Georgia could only claim dower in such lands as her husband died seised of, she may recover it in South Carolina in all lands of which he was seised in the latter State during coverture. The right of dower does not result from any contract, nor is it a right which is guarded by constitutional provisions of the State. It is an incident of the marriage relation resulting from wedlock, established by positive institutions of the country where it is applied, so that a widow is entitled to dower, although the marriage was consummated abroad, where the common law does not obtain.[2] And it results, moreover, from wedlock by the operation of existing laws at the time of the husband's death.[3]

§ 359. **Rule as to Time in Respect to Dower.** — But though dower is to be assigned according to the law in force at the death of the husband, that is not always a test of the widow's right to be endowed. Thus, for instance, where land of the husband was sold for the payment of debts, under a law which cut off the right of dower therein, and a subsequent statute was enacted securing to a widow dower out of all the lands of which her husband was seised during coverture, it was held that it would not extend to lands previously sold during coverture under the then existing law.[4] So where a statute had changed the common law by restricting a widow's dower to lands of which her husband died seised, but saved all rights which had already attached, a husband during coverture had previously sold an estate by deed in which his wife

[1] Duncan *v.* Dick, Walker, 281; Story, Confl. Laws, § 448; 2 Kent, Com. 183, n.; Lamar *v.* Scott, 3 Strobh. 562; Jones *v.* Gerock, 6 Jones, Eq. (N. C.) 190; Burnet *v.* Burnet, 46 N. J. Eq. 144; s. c. 18 Atl. Rep. 374.

[2] Moore *v.* The Mayor, 8 N. Y. 110.

[3] Melizet's App., 17 Penn. St. 449; Lucas *v.* Sawyer, 17 Iowa, 517; Randall *v.* Kreiger, 23 Wall. 147.

[4] Kennerly *v.* Missouri Ins. Co., 11 Mo. 204.

did not join, and they had removed from the State, it was held that she had a right to claim dower in this estate.[1] Upon the same principle, where a statute gave dower to a wife upon her divorce from her husband for his misconduct, it was held not to retroact so as to affect lands conveyed by him before such statute was passed.[2] So where the statute of a State excluded a wife from dower who had been divorced for her "aggression," it was held that a divorce granted in another State, though for such cause, did not operate to bar her claim in the former State.[3] If after the death of the husband and before judgment in an action of dower, the law is changed, her rights in respect to the same are determined by the law as it was at her husband's death.[4] And the same rule applies where the husband has conveyed the land during coverture; the law at the time of such conveyance fixes the wife's right to dower in the same.[5]

§ 360. **Inchoate Right of Dower not a Vested Interest** —[Until the husband's death the right of dower is *inchoate*. This inchoate right of dower is not an estate, and it is therefore subject, during coverture, to be altered or abolished.[6]]

[1] Johnson *v.* Vandyke, 6 McLean, 422. This was a case arising in Michigan.

[2] M'Cafferty *v.* M'Cafferty, 8 Blackf. 218; Conly *v.* Strader. 1 Smith (Ind.), 75; s. c. 1 Ind. 134.

[3] Mansfield *v.* M'Intyre, 10 Ohio, 27.

[4] Burke *v.* Barron, 8 Iowa, 132.

[5] O'Ferrall *v.* Simplot, 4 Iowa, 381; Young *v.* Wolcott, 1 Iowa, 174. But see Strong *v.* Clem, 12 Ind. 37, and cases cited in Moore *v.* Kent, 37 Iowa, 20.

[6] Moore *v.* Mayor, 8 N. Y. 114; Melizet's App., 17 Penn. St. 455; Lucas *v.* Sawyer, 17 Iowa, 517; Merrill *v.* Sherburne, 1 N. H. 199; Barbour *v.* Barbour, 46 Me. 9; Magee *v.* Young, 40 Miss. 164; s. c. 90 Am. Dec. 322; Chouteau *v.* Mo. Pac. R. Co., 122 Mo. 375, 394; s. c. 22 S. W. Rep. 485; 30 S. W. Rep. 299; Randall *v.* Kreiger, 23 Wall. 137; McNeer *v.* McNeer, 142 Ill. 388; s. c. 32 N. E. Rep. 681; Thornburg *v.* Thornburg, 18 W. Va. 522. This doctrine has been doubted in Massachusetts, where an inchoate right of dower is regarded as an interest in property. Dunn *v.* Sargent, 101 Mass. 336, 340. In Iowa, the inchoate right having attached, and the husband having conveyed without his wife joining, an abolishing statute was restricted to the time of the husband's conveyance, and the wife took dower under the law as it existed at that time. Moore *v.* Kent, 37 Iowa, 20.

CHAPTER XI.

DOWER — OF WHAT A WIDOW IS DOWABLE.

§ 361. Dower in lands, tenements, and hereditaments.
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365. Reversions and remainders.
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§ 361. **Dower in Lands, Tenements, and Hereditaments.** — In the first place, by the common law the widow is dowable of all lands, tenements, or hereditaments, corporeal and incorporeal, of which the husband may have been seised in fee or in tail during coverture.[1]

§ 362. **Must be of Estates of Inheritance.** — The estate of the husband in these must have been one of inheritance, for, as hers is a mere continuance of the estate of her husband, if his was less than one of inheritance it cannot extend beyond his own life.[2] Thus where the donee in tail of an estate is, by statute,

[1] 2 Bl. Com. 131.

[2] Crabb, Real Prop. 132; Park, Dow. 47. See Gorham *v.* Daniels, 23 Vt. 600, a case of dower in a husband's life estate.

made tenant for life with a fee-simple in the heirs of his body, his wife cannot claim dower.[1] And this is true even though he be seised of an estate *per auter vie*, and dies before the *cestui que vie*.[2] The estate in such a case became at common law a kind of derelict to be seized upon by the first occupant who chose to appropriate it, since, being a freehold, it would not go to the executors of the tenant, and not being one of inheritance it did not go to his heirs. Nor does it make any difference in respect of dower that by the statute 29 Car. II. such estate goes to the heir of the tenant as special occupant. Different provisions are made in different States in respect to it; as in New York, if it is not devised by the tenant it goes to his executors. In Massachusetts it descends like estates in fee.[3] [But if the husband purchase a fee with his own money he will not be allowed to defeat his wife's right of dower by taking a conveyance to himself for life, with remainder to his child or other voluntary donee.[4]]

§ 363. **Estates for Years.** — If the estate of the husband be a term for years, his wife cannot claim dower out of it at common law, no matter how long it is to continue, nor though it be renewable forever.[5] In Massachusetts, terms for a hundred or more years are clothed with the incidents of fee-simple estates, including the right of dower, so long as fifty years of the term remain.[6] But in Connecticut, an estate for nine hundred and ninety-nine years in a husband does not give his wife a right of dower therein,[7] although in another case, for the purposes of taxation, such an estate has been treated as a fee.[8]

[1] Burris *v.* Page, 12 Mo. 358.

[2] Park, Dow. 48; Gillis *v.* Brown, 5 Cow. 388; Fisher *v.* Grimes, 1 Sm. & M. Ch. 107.

[3] Pub. Stat. Mass. c. 125, § 1. See *ante*, § 235.

[4] Tucker *v.* Tucker, 32 Mo. 464; Crecelius *v.* Horst, 11 Mo. App. 304; Jiggetts *v.* Jiggetts, 40 Miss. 718.

[5] Park, Dow. 47; Ware *v.* Washington, 6 Sm. & M. 737; Spangler *v.* Stanler, 1 Md. Ch. Dec. 36. The right conferred by the United States under the Guano Islands Act (R. S. tit. 72), although it is extended (R. S. § 5572) to the widow, heirs, etc., of the discoverer, is an estate at will, not subject to dower. Duncan *v.* Navassa Phos. Co., 137 U. S. 647.

[6] Pub. Stat. c. 121, § 1.

[7] Goodwin *v.* Goodwin, 33 Conn. 314.

[8] Brainard *v.* Colchester, 31 Conn. 407.

§ 364. **Must be Estate which her Issue could inherit.** — The inheritance, moreover, must be such a one as the issue of the wife might by possibility take by descent.[1] This relates to the question whether her issue could inherit, if she had any, and not her physical capacity to bear children. As where an estate was given to A and the heirs of his body begotten of his wife B. Here, according to Coke, though B were a hundred, and A but seven years old, B would be entitled to dower; whereas, if B died and A married again, his second wife, though she may have borne him children, could not claim dower.[2]

§ 365. **Reversions and Remainders.** — The inheritance, besides, must be an entire one, and one of which the husband may have corporeal seisin, or a right to such seisin during coverture.[3] If, therefore, the husband have only a reversion or remainder after a freehold estate in another, though it be in fee, it will not give his wife a right of dower therein, unless by the death of the intermediate freeholder, or a surrender of his estate to the husband, the inheritance become entire in the husband during coverture.[4] And if the husband sell his reversion during the continuance of the particular estate for life, his wife thereby loses all claim to dower therein.[5] But if the intermediate estate, subject to which the husband has a reversion or remainder in fee, be a term for years or chattel interest, the wife will be entitled to dower in the fee.[6] And where there was a *devise* to the executors to pay debts, and after to the testator's

[1] Lit. § 53.

[2] Co. Lit. 40 *a*; 2 Bl. Com. 131; Tud. Cas. 45.

[3] Tud. Cas. 43; Apple *v.* Apple, 1 Head, 348.

[4] Tud. Cas. 43; Perkins, § 337; Park, Dow. 57, 74, 76; 2 Crabb, Real Prop. 132, 158; 1 Atk. Conv. 256; 4 Kent, Com. 39; Duncomb *v.* Duncomb, 3 Lev. 437; Eldredge *v.* Forrestal, 7 Mass. 253; Baker *v.* Baker, 167 Mass. 575; s. c. 46 N. E. Rep. 391; Shoemaker *v.* Walker, 2 S. & R. 554; Dunham *v.* Osborn, 1 Paige, 634; Robison *v.* Codman, 1 Sumn. 121, 130; Moore *v.* Esty, 5 N. H. 479; Otis *v.* Parshley, 10 N. H. 403; Green *v.* Putnam, 1 Barb. 500; Arnold *v.* Arnold, 8 B. Mon. 202; Fisk *v.* Eastman, 5 N. H. 240; Beardslee *v.* Beardslee, 5 Barb. 324; Durando *v.* Durando, 23 N. Y. 331; Brooks *v.* Everett, 13 Allen, 457; Kellett *v.* Shepard, 139 Ill. 433; s. c. 28 N. E. Rep. 751; 34 N. E. Rep. 254; Carter *v.* McDaniel, 94 Ky. 564; s. c. 23 S. W. Rep. 507; Kenyon *v.* Kenyon, 17 R. I. 539; s. c. 23 Atl. Rep. 101; 24 Atl. Rep. 787; Houston *v.* Smith, 88 N. C. 312.

[5] Apple *v.* Apple, 1 Head, 348; Gardner *v.* Greene, 5 R. I. 104.

[6] 2 Crabb, Real Prop. 133, 158; Park, Dow. 77; Bates *v.* Bates, 1 Ld. Raym. 326.

son in tail, it was held that the devise to the executors was of a chattel interest, and that the widow of the son was entitled to dower subject to the payment of the testator's debt.[1] Nor will it make any difference in regard to a widow's right of dower that the husband, before marriage, converted, by his own act, a present estate in fee into one for life or into a reversion. She could not claim dower though the deed of the husband had never been recorded.[2] If the husband is seised of a life estate in lands and acquire the immediate reversion or remainder in fee expectant upon its determination they will, upon a familiar principle of law that a greater will merge a less estate if they unite in one person by the same right at the same time, become one entire estate of inheritance, and consequently his wife would be entitled to dower out of it if she survive him.[3]

§ 366. **Dower prevented by Intervening Contingent Remainder.** — [But if between the husband's life estate and his remainder in fee there intervene a vested freehold estate, there will be no merger, and consequently the widow will not take dower.[4]]

§ 367. **Merger destroying Intervening Contingent Remainder.** — If now there were interposed between this life estate and the reversion or remainder, a contingent remainder, the contingent remainder would be defeated by merger, because it is a principle of the common law that if the particular or previous estate of freehold on which the contingent remainder depends, is destroyed or determined before such remainder has become vested, it fails for want of support, and is consequently defeated, and the life estate, in the supposed case, is swallowed up and lost in the remainder in fee. The consequence in such a case would be, that the widow of such tenant for life would be entitled to dower.[5]

§ 368. **No Merger where all the Estates created by same Act.** — But if the several interests, namely, the life estate, the con-

[1] Hitchens *v.* Hitchens, 2 Vern. 403; Perkins, § 335; 2 Crabb, Real Prop. 150; Tud. Cas. 43.

[2] Blood *v.* Blood, 23 Pick. 80.

[3] Beardslee *v.* Beardslee, 5 Barb. 324; House *v.* Jackson, 50 N. Y. 161; Powers *v.* Jackson, 57 N. Y. 654.

[4] Moore *v.* Esty, 5 N. H. 479. And where the widow is dowable out of equitable estates the same rule is applied. *In re* Mitchell, 2 Ch. 100.

[5] Wms. Real Prop. 235; Hooker *v.* Hooker, Cas. temp. Hardw. 13; Purefoy *v.* Rogers, 2 Saund. 380.

tingent remainder, and the remainder or reversion in fee be created or raised by the same act, deed, or devise, the law will not, by applying the technical rule of merger, allow the contingent remainder to be destroyed by the life estate and remainder being united in one person. But whenever it vests by the contingency happening, which gives it vitality as an estate, the life estate and remainder will open and let it in. Thus, suppose A by will devises to his son and heir an estate for life, with a contingent remainder to the heirs of B in fee, and either expressly devises the remainder to his son or makes no disposition of it and it descends as a reversion to his son as heir. Here the son has a life estate and a reversion or a remainder in fee without any estate interposed, and if he had acquired it by grant or descent from some one else, it would have merged the life estate, extinguished the contingent remainder, and given his wife dower. But as he takes under the same will which creates the contingent remainder, he shall not be at liberty to give effect to the testator's intention in one part, and defeat it in another, and merger will not take place, and consequently the wife cannot claim dower.[1] When, therefore, as in the last case, the contingent remainder is not defeated by law, its interposition between the life estate and reversion prevents the inheritance in the husband being an entire one, which is necessary in order to give dower.[2] *

* Note. — Mr. Park, however, intimates that in such case there would be such a union between the life estate and reversion as to give the wife of the holder dower until the contingent remainder vests, and the life estate and reversion open to let it in. Park, Dow. 72. And other writers agree with Mr. Park in the views he suggests. 2 Roper, Husb. & Wife, 362–365; 2 Crabb, Real Prop. 160; 1 Atk. Conv. 256; Tud. Cas. 43. But much of the nice speculation upon the extinction of contingent remainders by merger in similar cases is done away with in England by Stat. 8 & 9 Vict. c. 106, § 8, saving such remainder from being defeated by the determination of the particular estate on which it depends before it has vested. Wms. Real Prop. 279. And such are the statutes of Massachusetts, Maine, New York, Indiana, Missouri, Kentucky, Texas, Virginia, Michigan, Minnesota, and Wisconsin. And see *post*, note at the end of § 1600.

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[1] Hooker *v.* Hooker, Cas. temp. Hardw. 13; s. c. 2 Barnard. 200; id. 380; Plunket *v.* Holmes, T. Raym. 30; Lewis Bowles's Case, 11 Rep. 80; Park, Dow. 65–70; Fearne, Cont. Rem. 343, 344; Crump *v.* Norwood, 7 Taunt. 362; Tud. Cas. 43.

[2] 1 Atk. Conv. 256.

§ 369. **Dower after a Possibility.** — The foregoing positions are in harmony with the doctrine that the interposition of a *possibility*, not intending thereby what is understood by the law to be a condition that the present estate of the husband should be prevented by the terms of its limitation from becoming an estate of inheritance, defeats the right of dower in his wife, so long as that possibility exists. Thus, though an estate in joint tenancy be, in terms, one of inheritance in each of the joint tenants, yet the possibility, so long as the joint ownership subsists, that the present estate of each may be completely defeated by his dying in the lifetime of the other, prevents the right of dower attaching in the wife of either except the actual survivor.[1] So where the tenant for life leases his estate to the remainder-man in fee for the life of the lessee, the possibility that the lessor may survive the lessee, and thus have a reversion in fact after the death of the lessee, prevents such a union or entirety of the inheritance and freehold in the remainder-man as to give his wife dower.[2]

§ 370. **No Dower in Estates in Joint Tenancy.** — From the nature of the estate of joint tenants, no right of dower attaches in favor of either of the tenants, which his wife can enforce, unless her husband survives the others.[3] In many of the United States the principle of survivorship among joint tenants is abolished by statute, and consequently this disability of being endowed is removed on the part of their wives.[4]

§ 371. **Estates in Common.** — The estate of a tenant in common is subject to dower as if held in severalty, but it will be set off in common, unless partition be made during the life of the husband between the tenants, in which case the dower of each tenant's wife is limited to the portion set apart to him.[5]

[1] Park, Dow. 72.

[2] Park, Dow. 58; 2 Rolle, Abr. 497; 1 Atk. Conv. 256; Park, Dow. 73; Duncomb *v.* Duncomb, 3 Lev. 437; Fearne, Cont. Rem. 349.

[3] Park, Dow. 88; Co. Lit. 37 *b*; Mayburry *v.* Brien, 15 Pet. 21; 2 Crabb, Real Prop. 134; Broughton *v.* Randall, Cro. Eliz. 503.

[4] In North Carolina, Weir *v.* Tate, 4 Ired. Eq. 264; South Carolina, Reed *v.* Kennedy, 2 Strobh. 67; Kentucky, Davis *v.* Logan, 9 Dana, 185. See Rawle's note to Wms. Real Prop. 132. See § 857, note.

[5] Lit. § 44; Perkins, § 310; Park, Dow. 42; Tud. Case, 46; Reynard *v.* Spence, 4 Beav. 103; Potter *v.* Wheeler, 13 Mass. 504; Wilkinson *v.* Parish, 3 Paige, 653; Totten *v.* Stuyvesant, 3 Edw. Ch. 500; Davis *v.* Bartholomew, 3 Ind. 485; Lloyd *v.* Conover, 25 N. J. 47, 52.

The wife of a tenant in common holds her inchoate right of dower so completely subject to the incidents of such an estate, that she not only takes her dower out of such part only of the common estate as shall have been set to her husband in partition, but if, by law, the entire estate should be sold in order to effect a partition, she loses by such sale all claim to the land, although no party to such proceeding. But, as will be shown hereafter, she is, in some cases, allowed in equity to share in the proceeds of such sale.[1]

§ 372. **Estates exchanged.** — Where a husband exchanges lands, using the term in its strict technical meaning,[2] his wife may have dower in either of the estates, but she cannot claim it in both, though the husband has been seized of both during coverture.[3] In this country the doctrine of exchanges of lands has prevailed to but a limited extent. It is recognized by the statutes of New York, Kentucky, Wisconsin, and Arkansas, and some other States,[4] but it is limited to cases of exchanges of equal interests. If they are unequal, the case comes within the ordinary transfers of real estate, and the rights of dower attach accordingly.[5] So it has been held in Maine, that if two tenants in common divide their estates by simply executing mutual releases, the wife of one of them shall not take dower in both parcels.[6] But if the exchange was of unequal parts, one tenant paying the difference in value to the other, it takes the character of an ordinary transfer of lands, and the widow may claim dower in both parcels.[7] And it was held in New Hampshire that where the owners of lands agreed to exchange lands, which was done by each executing to the other a deed of his land in usual form, the wives might claim dower in both parcels.[8]

[1] Lee *v.* Lindell, 22 Mo. 202. See also Warren *v.* Twilley, 10 Md. 39 ; Weaver *v.* Gregg, 6 Ohio St. 547.

[2] See Termes de la Ley, 319 ; 2 Bl. Com. 323.

[3] Perkins, § 319; Co. Lit. 31 *b*.

[4] Stevens *v.* Smith, 4 J. J. Marsh. 64. In many of the States, if she does not elect within one year to take dower in the lands given in exchange, she is deemed to have elected to take her dower in those received in exchange. See statutes *post*, at the end of § 489.

[5] Wilcox *v.* Randall, 7 Barb. 633.

[6] Mosher *v.* Mosher, 32 Me. 412.

[7] Ibid.

[8] Case *v.* Thompson, 1 N. H. 65.

§ 373. **Partnership Estates.** — It may be laid down as a general proposition, that if real estate is purchased by two or more partners, and paid for out of partnership funds, and held for partnership purposes, though it will be regarded in law as held by the several partners as tenants in common, yet in equity it is so far regarded in the light of personalty as to be subject, under an implied trust, to be sold and applied if necessary for the payment of the partnership debts. Nor can the widow of one of such partners claim dower out of any part of such estate, except such as may not be required for the payment of the partnership debts. Of that she may claim her dower both at law and in equity.[1] It is, indeed, intimated in one case above cited,[2] that the character of personalty may be stamped upon real estate held by a copartnership by an express or implied agreement indicating such intention. But this could only be done in equity.[3] And where land was bought by several for purposes of speculation, and the title taken in the name of one as trustee for all, with an agreement that it should be sold and the proceeds divided, the court regarded it as personalty, and, upon the death of one of the *cestuis que trust*, held that it did not descend to heirs or give his widow a claim of dower.[4] Although it would seem that without such agreement the widow of the *cestui que trust* would be entitled to dower in the estate so held.[5] The taking the title in the name of one of several copartners does not seem to make any difference in this

[1] Greene *v.* Greene, 1 Ham. 250 ; Sumner *v.* Hampson, 8 Ham. 365 ; Burnside *v.* Merrick, 4 Met. 537 ; Dyer *v.* Clark, 5 Met. 562 ; Howard *v.* Priest, 5 Met. 582 ; Woolridge *v.* Wilkins, 3 How. (Miss.) 360 ; Duhring *v.* Duhring, 20 Mo. 174 ; Richardson *v.* Wyatt, 2 Desaus. 471 ; Pierce *v.* Trigg, 10 Leigh, 406 ; Goodburn *v.* Stevens, 5 Gill, 1 ; Markham *v.* Merritt, 7 How. (Miss.) 437; Loubat *v.* Nourse, 5 Fla. 350 ; Bopp *v.* Fox, 63 Ill. 540 ; Trowbridge *v.* Cross, 117 Ill. 109 ; s. c. 7 N. E. Rep. 347 ; Grissom *v.* Moore, 106 Ind. 296 ; s. c. 6 N. E. Rep. 629 ; Free *v.* Beatley, 95 Mich. 426 ; s. c. 45 N. W. Rep. 910 ; Sparger *v.* Moore, 117 N. C. 449 ; s. c. 23 S. E. Rep. 359 ; Ratcliffe *v.* Mason, 92 Ky. 190 ; s. c. 17 S. W. Rep. 438 ; Clay *v.* Freeman, 118 U. S. 97. The doctrine is questioned, but not overruled, in Hughes *v.* Allen, 66 Vt. 95. See *post*, § 899. If, therefore, the firm is insolvent, she can get nothing. Willet *v.* Brown, 65 Mo. 138.

[2] Goodburn *v.* Stevens, 5 Gill, 1.

[3] See Markham *v.* Merrett, 7 How. (Miss.) 437, and the dictum of the Vice-Chancellor in Smith *v.* Jackson, 2 Edw. Ch. 36, in respect to the above-cited case of Greene *v.* Greene, 1 Ham. 250.

[4] Coster *v.* Clark, 3 Edw. Ch. 428.

[5] Hawley *v.* James, 5 Paige, 451–457.

respect, unless, as was done in one case, the partner so holding the title had, by agreement, been charged by the partnership as debtor for the purchase-money.[1] But it is only when and so long as they constitute a part of the partnership property that lands are exempt from the claim of dower, for where two parties engaged in buying and selling lands and town lots, taking and giving deeds as tenants in common, and lands were sold accordingly in the lifetime of both partners, it was held that by such sale they were withdrawn from the joint stock, and that, to the claim for dower by the widow of one of the partners, the tenant could not avail himself at law of the fact that the land had been a part of the joint stock of the former owners.[2] And where the purchase and holding of land by persons who were partners was not done with an intention to throw it into the fund as partnership stock, but was collateral to their partnership business, and as a means of carrying that on, it was held that the widow of one of the partners was not excluded from her claim to dower. Thus where W and C agreed to purchase two hundred acres of land, on which was a mill, and, having done so, commenced and carried on the business of milling as partners upon the premises for several years, it was held that as to the real estate they were tenants in common, and their wives entitled to dower.[3]

§ 374. **Equitable Estates in England.** — [For reasons which have now a mere historical interest,[4] the English courts of equity, down to the passage of the late Dower Act, 3 & 4 Wm. IV. c. 105,[5] refused to apply the rules of the common law to the husband's estates in favor of the wife, as they had applied them to the wife's estates in favor of the husband. Consequently, although a husband took curtesy in the wife's equitable estates, the wife was not entitled to dower in the husband's equitable estates. This restriction was even extended to an equity of redemption.[6]]

[1] Story, Part. §§ 92, 93; Collyer, Part. 82; Smith *v.* Smith, 5 Ves. 189; Park, Dow. 106.

[2] Markham *v.* Merrett, 7 How. (Miss.) 437.

[3] Wheatley *v.* Calhoun, 12 Leigh, 254; Hale *v.* Plummer, 6 Ind. 121.

[4] See Perkins, § 349; Wms. Real Prop. 224; D'Arcy *v.* Blake, 2 Sch. & Lef. 387.

[5] 1 Spence, Eq. Jur. 501; 1 Atk. Conv. 278.

[6] Eq. Cas. Abr. 384; 2 Crabb, Real Prop. 133; 4 Kent, Com. 43; Tud. Cas.

§ 375. **Equitable Estates in the United States.** — As a general proposition, the law in the United States coincides with that of England, as to dower in equitable estates, under her present Dower Act, although it is not uniform in all the States, and in some the ancient doctrine prevails. Thus, it has been held in the District of Columbia, a wife is not dowable of an equity of redemption.[1] So, in Maine, the wife of a *cestui que trust* is not dowable.[2] But in Maryland she would be dowable if the husband hold the equitable estate at his death. And the law is the same in New York, Kentucky, North Carolina, Iowa, Tennessee, Arkansas, and Illinois.[3] In Pennsylvania, also, the wife of a *cestui que trust* is dowable.[4] And the law is the same for both legal and equitable estates in this respect. Dower belongs to both.[5] In Virginia, West Virginia, New Jersey, and Alabama, a wife may have dower out of a complete equitable estate of the husband, if it be such that a court of equity would enforce the conveyance of the legal estate.[6] Other cases of equitable estates, where, by local law, dower has been allowed, might be enumerated, as in Kentucky, Ohio, Missouri, and Illinois, where a widow is dowable of lands contracted for by the husband, but not conveyed till after his death.[7] In Massachusetts, as a general proposition, the common law as to dower in equitable estates prevails. But by statute, where there is an agreement to convey lands, and the party to whom the conveyance is to be made dies, provision is made whereby any person having an

46; 1 Roper, Hus. & Wife, 354–358; Dixon *v.* Saville, 1 Bro. C. C. 326; D'Arcy *v.* Blake, 2 Sch. & Lef. 387; Mayburry *v.* O'Brien, 15 Pet. 21. The case of Banks *v.* Sutton, 2 P. Wms. 700, in favor of allowing dower in such cases, was overruled. Park, Dow. 138.

[1] Stelle *v.* Carroll, 12 Pet. 201.

[2] Hamlin *v.* Hamlin, 19 Me. 141.

[3] Bowie *v.* Berry, 1 Md. Ch. Dec. 452; Miller *v.* Stump, 3 Gill, 304; Hawley *v.* James, 5 Paige, 318, 452; Lawson *v.* Morton, 6 Dana, 471; Thompson *v.* Thompson, 1 Jones (N. C.), 430; Lewis *v.* James, 8 Humph. 537; Barnes *v.* Gay, 7 Iowa, 26; Gully *v.* Ray, 18 B. Mon. 107; Kirby *v.* Vantrece, 26 Ark. 368; Tate *v.* Jay, 31 Ark. 576; Tink *v.* Walker, 148 Ill. 234; s. c. 35 N. E. Rep. 765.

[4] Shoemaker *v.* Walker, 2 S. & R. 554; Jones *v.* Patterson, 12 Penn. St. 249.

[5] Dubs *v.* Dubs, 31 Penn. St. 149; Mershon *v.* Duer, 40 N. J. Eq. 333.

[6] Rowton *v.* Rowton, 1 Hen. & M. 92; see statutes at the end of § 489; Gillespie *v.* Somerville, 3 Stew. & P. 447; Yeo *v.* Mercereau, 3 Harr. 387.

[7] Robinson *v.* Miller, 1 B. Mon. 93; Smiley *v.* Wright, 2 Ohio, 512; Davenport *v.* Farrar, 1 Scam. 314; Howell *v.* Tump, 140 Mo. 441; s. c. 41 S. W. Rep. 976.

interest to compel performance may procure it to be made. And it has been held that the widow of such contracting party may claim dower, through such decree in the land conveyed.[1] But this applies only to cases where the contract has been performed on the part of the husband in his lifetime.[2] Where, however, a husband had bid off an estate sold by order of the court of equity, and had paid at the time of his death a part of the purchase-money, but had received no deed, it was held that his widow might have dower out of the estate, she contributing *pro rata* towards the balance of the purchase-money.[3]

§ 376. **Equities of Redemption.** — [In this country equities of redemption are always the subjects of dower. But the different phases which the right of dower presents with relation to mortgaged property are treated *post*, §§ 396, 403 *et seq.*]

§ 377. **Dower in Moneys.** — In many cases courts of equity allow dower out of money which is the proceeds of the sale of real estate, in place of assigning it out of the real estate itself, where the sale has been made by order of court or by the wrongful act of an agent or trustee, and the parties interested have elected to affirm the sale.[4] So, where land in which a widow has a right of dower is appropriated, under the exercise of eminent domain, for public uses, and a sum of money is awarded for such taking, she may claim and have as dower out of such money one third of the net income of the same.[5] In England, under like circumstances, the court awarded her as her dower a sum properly estimated out of the *corpus* or principal of the money paid for the land taken, instead of annual payments.[6] And where a mortgage in which the wife had joined was foreclosed by a sale of the premises, and a surplus remained after satisfying the mortgage debt, she was held entitled to dower out of such surplus.[7] [The subject of dower in equitable estates

[1] Reed *v.* Whitney, 7 Gray, 533 ; Pub. Stat. c. 151, s. 2, § 3.

[2] Lobdell *v.* Hayes, 4 Allen, 187.

[3] Church *v.* Church, 3 Sandf. Ch. 434.

[4] Chaney *v.* Chaney, 38 Ala. 35, 38 ; Williamson *v.* Mason, 23 Ala. 488 ; Schmitt *v.* Willis, 40 N. J. Eq. 515.

[5] Bonner *v.* Peterson, 44 Ill. 253.

[6] *Re* Hall's Estate, L. R. 9 Eq. 179.

[7] Bank of Commerce *v.* Owens, 31 Md. 320. Where the foreclosure takes place after the husband's death, it is perhaps unquestioned that his widow takes dower in the surplus. Titus *v.* Neilson, 5 Johns. Ch. 452 ; Hartshorne *v.* Hartshorne, 2 N. J.

is further discussed *post*, § 400, with relation to the equitable seisin of such estates.]

§ 378. **Estates subject to Liens.** — Akin to an equity of redemption, and governed in many respects by the same rule as to dower, is the interest which the husband has in lands for which the purchase-money has not been paid, in those States where the vendor of lands has a lien upon them for the purchase-money. The widow is entitled to share in the surplus left after discharging such lien, as will be explained when the subject of assigning dower in equity is considered.[1] And in Kentucky it has been held that a widow can only claim dower subject to lien of the builder, whom her husband has employed to erect buildings on the land.[2] But the law in this respect is otherwise held in Massachusetts, Illinois, and Indiana, in which States similar questions have been raised.[3] For the widow's rights in a vendee's unperfected equity, see *post*, § 400.

§ 379. **Estates subject to Judgments.** — And where there was a judgment outstanding at the time of the marriage, which by the law of the State constituted a lien upon the land, the widow can only claim her dower in the land, subject to such lien,[4] unless the judgment happen to be entered up the same day

Eq. 349 ; Hawley *v.* Bradford, 9 Paige, 200 ; Thompson *v.* Cochran, 7 Humph. 72 ; Chaffee *v.* Franklin, 11 R. I. 578 ; Willett *v.* Beatty, 12 B. Mon. 172, 174 ; Matthews *v.* Duryee, 45 Barb. 69. Where before the husband's death, it has generally been held that the inchoate right of dower would be protected. Denton *v.* Nanny, 8 Barb. 618 ; Vartie *v.* Underwood, 18 Barb. 561, 564. And though these cases were doubted and such protection refused in Newhall *v.* Lynn Sav. Bk., 101 Mass. 428, perhaps on account of want of equity power, they have been uniformly followed in New York, Mills *v.* Van Voorhis, 23 Barb. 125, 134, 136 ; s. c. 20 N. Y. 412 ; Elmendorff *v.* Lockwood, 4 Lans. 393, 396; Raynor *v.* Raynor, 21 Hun, 36, 40 ; Matthews *v.* Duryee, 4 Keyes, 525 ; and see Jackson *v.* Edwards, 7 Paige, 386, 408; and in other States, De Wolff *v.* Murphy, 11 R. I. 630; Keith *v.* Trapier, 1 Bailey, Eq. 63 ; Vreeland *v.* Jacobus, 19 N. J. Eq. 231 ; Unger *v.* Leiter, 32 Ohio St. 210. In Virginia and Kentucky the right is given by statute. Robinson *v.* Schakett, 29 Gratt. 99; Tisdale *v.* Risk, 7 Bush, 139. See Schmitt *v.* Willis, 40 N. J. Eq. 515; s. c. 4 Atl. Rep. 767.

[1] McClure *v.* Harris, 12 B. Mon. 261 ; Miller *v.* Stump, 3 Gill, 304; Crane *v.* Palmer, 8 Blackf. 120 ; Ellicott *v.* Welch, 2 Bland, 242 ; Warner *v.* Van Alstyne, 3 Paige, 513 ; Williams *v.* Wood, 1 Humph. 408 ; Barnes *v.* Gay, 7 Iowa, 26. So by statute in several States. See *ante*, § 242 ; *post*, § 480.

[2] Nazareth Inst. *v.* Lowe, 1 B. Mon. 257.

[3] Van Vronker *v.* Eastman, 7 Met. 157 ; Shaeffer *v.* Weed, 3 Gilm. 511 ; Pifer *v.* Ward, 8 Blackf. 252 ; McCabe *v.* Bellows, 7 Gray, 148.

[4] Robbins *v.* Robbins, 8 Blackf. 174 ; Trustees *v.* Pratt, 10 Md. 5.

with the marriage, in which case the dower right obtains the precedence.[1]

§ 380. **Mines.** — A widow is entitled to dower in mines and quarries belonging to her husband in fee, which may have been opened during his lifetime, whether within his own land or that of another;[2] the working of the mines and quarries in such case, if within the dower lands of the widow, being a mode of enjoyment of the dower land itself. But though she may work an open mine, under her claim of dower, to exhaustion, she may not open new ones even within the land set to her as a part of her dower. Nor can she claim her dower in mines in other lands of her husband than those set off to her as her dower estate.[3]

§ 381. **Shares in Corporations.** — In Kentucky, shares in the capital stock of railroad companies, being deemed real estate, are subject to the claim of a widow's right of dower.[4] And a similar principle applies as to shares in some of the inland navigation companies in England.[5] But as a general thing, shares in corporations are considered mere personal chattels.

§ 382. **Wild Lands.** — In most of the States a widow is dowable of wild lands.[6] But in Massachusetts, Maine, and New Hampshire, it has been held, upon the principle of the

[1] Ingram *v.* Morris, 4 Harringt. 111.

[2] Stoughton *v.* Leigh, 1 Taunt. 402; Coates *v.* Cheever, 1 Cow. 460; Moore *v.* Rollins, 45 Me. 493; Gaines *v.* G. P. Iron Mining Co., 33 N. J. Eq. 603; Clift *v.* Clift, 87 Tenn. 17; s. c. 9 S. W. Rep. 360; Billings *v.* Taylor, 10 Pick. 460; Hendrix *v.* McBeth, 61 Ind. 473.

[3] Park, Dow. 119; Sayers *v.* Hoskinson, 110 Pa. St. 473; s. c. 1 Atl. Rep. 308. Under the Michigan statute the widow takes dower in unopened mines. *In re* Seager, 92 Mich. 186; s. c. 52 N. W. Rep. 299. What shall be regarded as an *open* mine or quarry is not always easy to define. In Coates *v.* Cheever, 1 Cow. 460, a bed of iron ore had been opened by the husband, and after being worked a while was discontinued, and partially filled up, and new openings had been made by the heir, and yet it was held, for purposes of dower, to be an open mine. In Billings *v.* Taylor, 10 Pick. 460, a quarry of slate-stone underlay about four acres. The mode of working it was to uncover a space of ten or twelve feet square, and excavate the slate to a certain depth, and then commence a new pit. At the time of the husband's death he had excavated about a quarter of an acre in this manner; and the question was, whether his widow could claim dower out of the four acres and excavate stone from any part that might be set to her, and it was held that she might, the whole being an open quarry.

[4] Price *v.* Price, 6 Dana, 107.

[5] Park, Dow. 113.

[6] Campbell's Appeal, 2 Doug. 141; Chapman *v.* Schroeder, 10 Ga. 321; Macau-

common law,[1] that a woman shall not be dowable of wild and uncultivated wood and forest lands, unless the same were used in connection with a cultivated farm and tenement for supplying fuel and timber for the necessary purposes of the farm.[2] Nor would the clearing and subduing of such land by the husband's grantee during his life give his widow any better right to dower in the same.[3]

§ 383. **Incorporeal Hereditaments.** — Dower may also be claimed out of various species of incorporeal hereditaments which belonged to the husband as an inheritance, such as rights of fishing, rents, and the like.[4] Of these last the chancellor, in Chase's Case,[5] remarked, while speaking of the law as it is understood in Maryland, "It is clear that a woman may be endowed of a rent service, rent charge, or rent-seck." * But care should be used to discriminate between hereditaments out of which, by the manner of their creation and the form in which they exist, dower may arise, and those where it may not. Thus of a personal annuity not issuing from lands, dower cannot be claimed, although the husband held it to himself and his heirs.[6] And so far as these hereditaments are appendant upon other estates, a right to be endowed of them is by reason of their appendancy to the estate out of which she has her dower.[7] So far as rents are concerned, they should, in order to attach to them the right of dower, be granted or created as estates of inheritance. But of such rents a widow is dowable, though it is apprehended that instances of these are rare in this country.[8]

* Note. — Yet *quære* as to *rent service*, unless, as in Pennsylvania, the statute *Quia Emptores* is not a part of the law of that State. Smith, Land. & T. 90 and n.

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lay *v.* Dismal Swamp, 2 Rob. 507; Hickman *v.* Irvine, 3 Dana, 121; Allen *v.* McCoy, 8 Ham. 418; Schnebly *v.* Schnebly, 26 Ill. 116; Brown *v.* Richards, 17 N. J. Eq. 32; Joyner *v.* Speed, 68 N. C. 236.

[1] Bracton, 315.

[2] Conner *v.* Shepherd, 15 Mass. 164; White *v.* Willis, 7 Pick. 143; Kuhn *v.* Kaler, 14 Me. 409; Stevens *v.* Owen, 25 Me. 94; Ford *v.* Erskine, 50 Me. 227; Johnson *v.* Perley, 2 N. H. 56; Fuller *v.* Watson, 7 N. H. 341.

[3] Webb *v.* Townsend, 1 Pick. 21.

[4] Co. Lit. 22 *a*; 2 Bl. Com. 132; Park, Dow. 36, 112; Perkins, § 347.

[5] Chase's Case, 1 Bland, 227.

[6] Perkins, § 347; Co. Lit. 132 *a*; Tud. Cas. 42; Aubin *v.* Daly, 4 B. & A. 59.

[7] Park, Dow. 115; 4 Kent, Com. 40.

[8] Co. Lit. 32 *a*; id. 144 *b*; 2 Cruise, Dig. 291; *post*, § 1193.

If, therefore, a man make a lease for years, reserving rent, and marry, and die before the expiration of the term, his wife will not be endowed of the rent, but she may be of the reversion, and the rent *pro rata* will belong to her as incident to the reversion.[1] But if, in the case supposed, the husband had made a lease for his own life, reserving rent, his wife could not claim dower either in the rent or the land, — not in the rent, for it is determined at the death of the husband, and not in the land, for of that the husband at no time during coverture had any other estate than a reversion.[2]

§ 384. **Crops.** — If corn or other annual crop be growing upon the husband's lands at the time of his death, which shall be assigned to her as dower, she will be entitled to the same, instead of his executors.[3] As a compensatory provision to the estate, the common law denied to her representatives the crops growing upon her dower land at her decease.[4] But the statute of Merton, c. 2, interposed, and gave her the right of disposal of these, and they now go to personal representatives of the tenant in dower, like emblements in other cases.[5]

[1] Co. Lit. 32 *a*; Stoughton *v.* Leigh, 1 Taunt. 410; Chase's Case, 1 Bland, 227; Weir *v.* Tate, 4 Ired. Eq. 264.

[2] Co. Lit. 32 *a*; Weir *v.* Tate, 4 Ired. Eq. 264.

[3] 2d Inst. 81; Ralston *v.* Ralston, 3 G. Greene (Iowa), 533.

[4] Bracton, §§ 2, 96.

[5] 2d Inst. 81; Park, Dow. 355.

CHAPTER XII.

DOWER — REQUISITES OF DOWER.

§ 385. The requisites of dower.
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§ 385. **The Requisites of Dower** are, marriage, seisin of the husband, and his death;[1] and these will be considered in their order.

[1] 2 Bl. Com. 130.

§ 386. **The Marriage must be legal,** though if voidable only, and not void, the wife will be entitled to dower if it be not dissolved during the life of the husband.[1]

§ 387. **What Marriages legal.** — Among the marriages which are void at common law are those with idiots and with persons insane at the time, especially if they do not afterwards have lucid intervals, and do that which will give validity to the marriage.[2] So would be a marriage with a second wife during the life of the first without a divorce first had, even though the first wife were to die during the lifetime of the husband, unless the cohabitation after her death were under such circumstances as to raise a legal presumption that a marriage had taken place after the husband was again free to contract it.[3] The age at which parties may contract a legal marriage varies in different countries and States, though, if contracted at an earlier age, they are not void, but voidable, and, unless avoided in the husband's lifetime, will lay the foundation for a claim of dower. At the common law this age was fourteen in males, and twelve in females. Yet it is said a widow may have dower, if of the age of nine years at the death of her husband.[4]

§ 388. **Validity of Marriage, how determined.** — As a general proposition, though limited by statute provisions in some cases, the validity of a marriage in any given case is to be determined by the law of the country in which it is solemnized. If valid there it will be valid everywhere, and so if void there it is everywhere void.[5] One of the exceptions to this would be a marriage which is polygamous or incestuous.[6] But in order to be incestuous it must be such as is so by the law of nature, and is by the general consent of all Christendom deemed to be incestuous.[7] Thus, where an aunt and nephew intermarried in

[1] Co. Lit. 33 *a*; Tud. Cas. 45; Tompert *v.* Tompert, 13 Bush, 326; s. c. 26 Am. Rep. 197.

[2] 2 Bl. Com. 130; Clancy, Rights of Wom. 297; Jenkins *v.* Jenkins, 2 Dana, 102; Bishop, Mar. & D. Book 3, c. 8.

[3] Higgins *v.* Breen, 9 Mo. 493; Perkins, §§ 304, 305; Smart *v.* Whaley, 6 Sm. & M. 308; Donnelly *v.* Donnelly, 8 B. Mon. 113.

[4] Co. Lit. 33 *a*.

[5] Clark *v.* Clark, 8 Cush. 385; Story, Confl. of Laws, § 113; W. Cambridge *v.* Lexington, 1 Pick. 505; Putnam *v.* Putnam, 8 Pick. 433.

[6] Story, Confl. of Laws, § 113; Smith *v.* Smith, 5 Ohio St. 32.

[7] Medway *v.* Needham, 16 Mass. 157; Greenwood *v.* Curtis, 6 Mass. 358, 378; Sutton *v.* Warren, 10 Met. 451; Story, Confl. of Laws, § 114.

a country where such a marriage was voidable but not void, and removed to another, where such a marriage is absolutely prohibited, it was nevertheless held that the marriage was here to be regarded as a valid one.[1] Another exception arises from the positive provisions of local law, invalidating, within that locality, marriages contracted elsewhere in violation of such a law, and sought to be enforced in the latter State. But to constitute such an exception the parties to which it is applied must be citizens of the State in which such law exists, and subject to its laws at the time it is applied. Thus, suppose a party who is divorced for his own fault is prohibited to marry by the law of the State where such divorce is granted, a marriage solemnized between him and another in that State would be void. But if he go into another State where no such law exists, and marry there, the marriage would be so far lawful in the State of his domicil as to give his wife dower.[2] And even if a party who has been divorced in another State for a cause which would not be the ground of a divorce here, the parties being citizens and domiciled there, comes here and marries in this State, it will be a valid marriage.[3] But if it is expressly provided, as it is in the statutes of Massachusetts,[4] that a marriage contracted by a party who is prohibited from marrying here, and who goes into another State and there marries, with an intent to return here and to evade the law of this State, shall be void here, it will be so held, although as to the State where it was contracted it was valid, and might be elsewhere.[5] Of

[1] Sutton *v.* Warren, 10 Met. 451 ; Stevenson *v.* Gray, 17 B. Mon. 193.

[2] Putnam *v.* Putnam, 8 Pick. 433 ; Commonwealth *v.* Hunt, 4 Cush. 49 ; Medway *v.* Needham, 16 Mass. 157.

[3] Clark *v.* Clark, 8 Cush. 385.

[4] Pub. Stat. 1881, c. 145, § 10. So in Delaware, Rev. Code 1893, c. 74, § 1.

[5] Commonwealth *v.* Lane, 113 Mass. 458, where it was held that the intent must be affirmatively shown, and both parties citizens of the latter State. State *v.* Kennedy, 76 N. C. 251; and see note to the case of Hanover *v.* Turner (14 Mass. 227), 7 Am. Dec. 203; Regina *v.* Chadwick, 11 Q. B. 205 ; Brook *v.* Brook, 3 Sm. & G. 481. According to the law of England as determined by the last case cited, the validity of the marriage, if void by the law of citizenship, is determined by that law irrespective of the law of the domicil; whereas in this country, a marriage, valid according to the law of the domicil and contracted there, is valid in the State of citizenship, although such marriage would have been void had the parties been domiciled there. See Commonwealth *v.* Lane, *supra*, where the English doctrine is criticised.

course, in such a case, the widow of such marriage could not claim dower in the State of her domicil.

§ 389. [**No Ceremony of Marriage is necessary**, unless the law of the State positively requires a ceremony as a prerequisite to validity. Therefore a "common law" marriage would give dower if such a marriage was valid in the State where contracted.[1] But although a statute prescribe a mode of solemnizing marriage, if it fail to declare void all marriages not so solemnized, no contract of marriage, valid at common law, will be rendered void.[2] But if] the ceremonial be not such as to constitute it a legal marriage where it is solemnized, it would not render it a valid marriage even in other places where the forms made use of would have been sufficient.[3]

§ 390. **Husband's Seisin.** — The husband must have been *seised* of the premises at some time during coverture. It is not required, as in case of curtesy, at common law, that there should have been an actual seisin or seisin in deed. It is enough that the husband had a seisin in law, with a right to an immediate actual seisin. If it were not so, it might often be in the husband's power, by neglecting to take such seisin, to deprive his wife of her right of dower.[4] The seisin in law above spoken of is such, by the way of example, as an heir has, when an estate in fee has descended to him without any adverse seisin in any third party.[5] But if before the marriage the husband shall have lost his seisin by a stranger entering and abating his right, and he marries and dies before regaining his seisin by entry or otherwise, his wife cannot claim dower for want of seisin.[6] And where a disseisor employed an agent to procure a deed of release from the disseisee, and the agent, instead of taking it to the disseisor, took it to himself, it was held that it did not give him as grantee such seisin as would entitle

[1] Mathewson *v.* Phœnix Iron Foundry, 20 Fed. Rep. 281.

[2] Meister *v.* Moore, 96 U. S. 76; Daniel *v.* Sams, 17 Fla. 487.

[3] Scrimshire *v.* Scrimshire, 2 Hagg. Consist. 395; Lacon *v.* Higgins, 3 Stark. 178; 2 Crabb, Real Prop. 128.

[4] Atwood *v.* Atwood, 22 Pick. 283; Mann *v.* Edson, 39 Me. 25; Co. Lit. 31 *a*; Tud. Cas. 45; 2 Bl. Com. 131; Bush *v.* Bush, 5 Houst. 245; Green *v.* Liter, 8 Cranch, 229, 247; Barnes *v.* Raper, 90 N. C. 189; Durando *v.* Durando, 23 N. Y. 331.

[5] 2 Crabb, Real Prop. 128; Co. Lit. 31 *a*; Dunham *v.* Osborne, 1 Paige, 634.

[6] 4 Dane, Abr. 669; Perkins, § 367.

his wife to dower, since one who is disseised could not convey a seisin to a stranger.[1] The same rule as above stated as to an abator applies in the case of disseisin, and the wife of a disseisee who was disseised before marriage cannot claim dower, although he still retains a right of entry, if he does not exercise this right and regain his seisin during coverture.[2] But in the case above supposed of the abatement of the heir, if he had married in the lifetime of the ancestor from whom the fee descended, the seisin in law which in such case the husband as heir had by the descent would enure to the wife's benefit in the way of dower, though an abator should enter and prevent her husband from acquiring actual seisin during their coverture.[3] If, therefore, at common law, the husband had not, during coverture, anything more than a mere right of entry or of action to obtain seisin, it would not be sufficient to entitle his widow to dower. Nor does it make any difference in the effect of a want of seisin that the husband parted with it before his marriage, with a view to defraud his creditors, or that the deed was not recorded.[4] The seisin of which mention thus far has been chiefly made should be understood as a legal seisin or its equivalent. We shall speak hereafter of dower in equitable estates where, under the English Dower Act, as well as by the laws of many of the States, a seisin in equity will be sufficient.[5]

§ 391. **Effect of Conveyance by Husband before Marriage.** — A voluntary conveyance by a husband immediately before marriage, if designed to bar his wife of dower, and this is not known to her, has been held, in equity, to be fraudulent and not to bar her, if the person to whom the conveyance is made was cognizant of the fact. And this seems clearly settled by an almost unbroken current of authority.[6]

[1] Small *v.* Proctor, 15 Mass. 495.

[2] Thompson *v.* Thompson, 1 Jones (N. C.), 430; Ellis *v.* Kyger, 90 Mo. 600; s. c. 3 S. W. Rep. 23.

[3] 2 Crabb, Real Prop. 129, etc.; 1 Brooke, Abr. Dower, 262.

[4] Tud. Cas. 45; Thompson *v.* Thompson, 1 Jones (N. C.), 430; Whithed *v.* Mallory, 4 Cush. 138; Blood *v.* Blood, 23 Pick. 80; Richardson *v.* Skolfield, 45 Maine, 386. And in Baker *v.* Chase, 6 Hill, 482, a conveyance immediately before marriage, without consideration and with the intent to deprive the wife of dower, was held a bar.

[5] *Post*, § 400. And see 2 Crabb, Real Prop. 130, 162.

[6] Swaine *v.* Perine, 5 Johns. Ch. 489; Petty *v.* Petty, 4 B. Mon. 215; Youngs

§ 392. **Seisin may be defeasible.** — It is not, however, necessary that the seisin of the husband should be a rightful or an indefeasible one. Thus the widow of a disseisor or an abator and the like, may hold dower against all persons except the person who has the rightful seisin, and who has regained it by entry or suit.[1] So, she may have dower out of lands held as a base, or qualified fee, or a fee upon condition, so long as the seisin of such an estate is undisturbed.[2] And it may be regarded as a general proposition, that where dower attaches to an estate it is always subject to the same equities that existed against the husband's title at the time of its attaching.

§ 393. **But the Husband's Seisin must be beneficial.** — [Therefore a widow will take no dower in land which her husband held upon a trust, whether express or implied, at the time of the marriage;[3] as where the husband, at the time of marriage, was under bond to convey, and afterwards conveyed, or died without conveying.[4]]

§ 394. **Duration of Seisin not material.** — No particular length of time, however, during which the husband should retain seisin, is required by law, no matter how brief it is, if it be for

v. Carter, 10 Hun, 194; s. c. 50 How. 410; Pomeroy *v.* Pomeroy, 54 How. 228; Brewer *v.* Connell, 11 Humph. 500; London *v.* London, 1 Humph. 1; Rowland *v.* Rowland, 2 Sneed, 543; Cranson *v.* Cranson, 4 Mich. 230; Brown *v.* Bronson, 35 Mich. 415; Rowe *v.* Bradley, 12 Cal. 226; Jenny *v.* Jenny, 24 Vt. 324; Buzick *v.* Buzick, 44 Iowa, 259; Crecelius *v.* Horst, 4 Mo. App. Ca. 419; Jiggits *v.* Jiggits, 40 Miss. 718; Smith *v.* Smith, 2 Halst. Ch. 515. This subject is fully considered in equity, and a conveyance made by husband or wife on the eve of marriage, unknown to the other, if made without valuable consideration, held void as to the other party, by Bates, Ch., in Chandler *v.* Hollingsworth, 3 Del. Ch. 99; *post*, § 2228.

[1] Park, Dow. 37; 4 Dane, Abr. 668.

[2] 1 Jarman, Wills, 792; Co. Lit. 241, n. 4; 1 Cruise, Dig. 162; 4 Dane, Abr. 668; Park, Dow. 50; Jackson *v.* Kip, 3 Halst. 241.

[3] Firestone *v.* Firestone, 2 Ohio St. 415; Robison *v.* Codman, 1 Sumn. 121.

[4] Hallett *v.* Parker, 68 N. H. 598; s. c. 39 Atl. Rep. 433; Chapman *v.* Chapman, 92 Va. 537; s. c. 24 S. E. Rep. 225; Miller *v.* Miller, 148 Mo. 113; s. c. 49 S. W. Rep. 852; Noel *v.* Jevon, Freem. Ch. 43; Hill, Trust. 269; Tnd. Cas. 47; 2 Eq. Cas. Abr. 383; Derush *v.* Brown, 8 Ham. 412; Greene *v.* Greene, 1 Ham. 249; Bartlett *v.* Gouge, 5 B. Mon. 152; Robison *v.* Codman, 1 Sumn. 121; Cowman *v.* Hall, 3 Gill & J. 398; Powell *v.* Monson, 3 Mason, 364; Cooper *v.* Whitney, 3 Hill, 95; Brooks *v.* Everett, 13 Allen, 458. So by statute in New Jersey. Rev. Stat. 1877, p. 324. But if the trustee acquire the equitable estate, the latter merges in the legal estate of the trustee, and his wife becomes entitled to dower. Hopkinson *v.* Dumas, 42 N. H. 303, 306.

the husband's own use and benefit, nor whether the seisin be one in law or in deed.[1]

§ 395. **Instantaneous Seisin — No Beneficial Interest.** — But if the seisin of the husband be merely instantaneous, intended as a means of accomplishing some ulterior purpose in regard to the estate, the husband being, as it were, a conduit through which the estate passes without an intent to clothe him with a beneficial interest, it would not give his wife any right of dower.[2] And it matters not whether the transaction consists of one conveyance or of several, or whether they are executed between two parties only or more.[3] In respect, therefore, to an instantaneous seisin, whether it shall be sufficient to confer the right of dower depends upon the character rather than the duration of the seisin.[4]

§ 396. **Dower in Case of Mortgages.** — The best illustration

[1] 2 Kent, Com. 39; McClure *v.* Harris, 12 B. Mon. 261; McCauley *v.* Grimes, 2 Gill & J. 318; Stanwood *v.* Dunning, 14 Me. 290; Gage *v.* Ward, 25 Me. 101; Douglass *v.* Dickson, 11 Rich. (S. C.) 417; Broughton *v.* Randall, Cro. Eliz. 502.

[2] 2 Crabb, Real Prop. 161; Stanwood *v.* Dunning, 14 Me. 290; Wooldridge *v.* Wilkins, 3 How. (Miss.) 360; Gully *v.* Ray, 18 B. Mon. 107. In 1 Scribner, Dower, 483–485, it is maintained that this is only against the mortgagee, and that even as against him there is a right in the wife to redeem; and this is so held in New Hampshire, Maryland, Maine, and some other jurisdictions.

[3] Hazleton *v.* Lesure, 9 Allen, 24, 26; King *v.* Stetson, 11 Allen, 407.

[4] McCauley *v.* Grimes, 2 Gill & J. 318; Mayburry *v.* Brien, 15 Pet. 21, 39; Webster *v.* Campbell, 1 Allen, 313; Pendleton *v.* Pomeroy, 4 Allen, 510; Smith *v.* McCarty, 119 Mass. 519; Johnson *v.* Plume, 77 Ind. 166; Hallett *v.* Parker, 68 N. H. 598; s. c. 39 Atl. Rep. 433. Thus in the case of McCauley *v.* Grimes, just cited, the object of the conveyance was to effect a division of the estate of a person deceased among his children, one of whom held a part of the estate by deed. By an agreement between H and the children, the one who held this deed conveyed the estate to H, who at the same time executed bonds to the several children for the payment of their respective shares, and secured the payment thereof by a mortgage of the same land; it was held that the wife of H could only claim her dower subject to this mortgage. So where a purchase was effected by one, and another advanced the purchase-money for the purchaser, and the vendor made a deed to the purchaser, who made a mortgage at the same time to the one who advanced the purchase-money to secure him the repayment thereof, it has been held by the courts of most of the States, that the seisin in the husband, the purchaser, in such a case, would be an instantaneous one, which would only give his wife dower subject to the mortgage. 4 Kent, Com. 39; Smith *v.* Stanley, 37 Me. 11; Grant *v.* Dodge, 43 Me. 489; Kittle *v.* Van Dyck, 1 Sand. Ch. 76; Gilliam *v.* Moore, 4 Leigh, 30; Gammon *v.* Freeman, 31 Me. 243. But see Adams *v.* Hill, 29 N. H. 202; McClure *v.* Harris, 12 B. Mon. 261; Scribner, Dow. c. 12, § 48; Mills *v.* Van Voorhis, 23 Barb. 125.

of what is intended by an instantaneous seisin in the husband, which will not give dower to the wife, is that of a deed and mortgage simultaneously made in pursuance of an agreement entered into at the time of making a purchase by the husband, and intended to secure to the vendor, or some one who advances the purchase-money for the estate, the payment of the same.[1] Nor would it make any difference that the mortgage embraced other land with that which the mortgagor has purchased of the mortgagee.[2] But the burden of proof is upon the party who relies upon the mortgage and deed constituting but one transaction.[3] In such cases the lien created by the mortgage takes precedence of the right of dower in the wife of the purchaser, although the title of the mortgagee, like that of the widow, is derived from the seisin of the husband. And in the cases above supposed, the seisin of the husband gives the wife a right of dower as against everybody but the mortgagee and his assigns, so that if the mortgage be discharged by the husband in his lifetime, or by his executor or administrator, she may be endowed as if it had never existed.[4] But if a purchaser pay a mortgage and have it assigned to him, it does not operate a discharge so as to let in the mortgagor's widow to dower, unless, when he became purchaser, he assumed the obligation of paying the mortgage. Nor does the recital in a deed of an estate, that the premises are subject to a mortgage, import a promise on the part of the purchaser that he is to pay such mortgage.[5] But, if it be undischarged, she may come in and avail herself of a right to redeem the estate from the mort-

[1] Stow *v.* Tifft, 15 Johns. 458; Reed *v.* Morrison, 12 S. & R. 18; Holbrook *v.* Finney, 4 Mass. 566; Bullard *v.* Bowers, 10 N. H. 500; Griggs *v.* Smith, 7 Halst. 22; Bogie *v.* Rutledge, 1 Bay, 312; Hinds *v.* Ballou, 44 N. H. 619; George *v.* Cooper, 15 W. Va. 666. Wife of grantee who at time he received title executed a bond to reconvey, and who had no interest independent thereof, acquires no right of dower. Hallett *v.* Parker, 68 N. H. 598; s. c. 39 Atl. Rep. 433.

[2] Moore *v.* Rollins, 45 Me. 493.

[3] Grant *v.* Dodge, 43 Me. 489; Smith *v.* McCarty, 119 Mass. 519.

[4] Bullard *v.* Bowers, 10 N. H. 500; Klinck *v.* Kackley, 2 Hill, Ch. 250; Brown *v.* Lapham, 3 Cush. 551. So where the vendee's lien is discharged by his taking further security. Blair *v.* Thompson, 11 Gratt. 441.

[5] Strong *v.* Converse, 8 Allen, 557; Fiske *v.* Tolman, 124 Mass. 254; and see *post*, § 1048.

gage.[1] [If a husband dies seised of land subject to a mortgage which he was under a personal obligation to pay, the widow is entitled to have the mortgage paid off out of the personal assets, if there are any;[2] unless such depletion of the personal assets would impair the rights of creditors.[3]] The effect upon the dower of the wife is the same whether the mortgage, made as above supposed, were for life or in fee, since, so far as the mortgage has effect, it conveys a freehold, and leaves only the reversion free from incumbrance.[4]

§ 397. **When Seisin instantaneous.** — But in all the cases of what is deemed such an instantaneous seisin as not to raise the right of dower, the same act that gives the husband the estate must convey it out of him again, so that as to him it shall be *in transitu* only.[5] Or the two conveyances to and from the husband must constitute in legal effect one entire transaction. This would be the case if both instruments were executed at the same time, between the same parties, relative to the same subject-matter.[6] And it is immaterial that they bear different dates, provided they are delivered at the same time, which may be proved by parol.[7] Equity, moreover, is disposed in favor of a mortgagee to give effect to a deed as having been simultaneously delivered, though not executed until some time after the

[1] Young *v.* Tarbell, 37 Me. 509; Mills *v.* Van Voorhis, 23 Barb. 125, 133.

[2] Henagan *v.* Harllee, 10 Rich. Eq. 285; Caroon *v.* Cooper, 63 N. C. 386; Peckham *v.* Hadmen, 8 R. I. 160.

[3] Rossiter *v.* Cossit, 15 N. H. 38; Creecy *v.* Pearce, 69 N. C. 67.

[4] Moore *v.* Esty, 5 N. H. 479, where a father gave his son a deed in fee of an estate, who at the same time gave back to the father a deed of the same land to hold for the term of his life, in which deed there was a recital that if the grantor performed the condition of a certain bond the grantee should not enter, it was held that, though it did not amount to a mortgage, it did not leave the son such a seisin as entitled his wife to dower, he having died in the lifetime of the father. But where A sold an estate to B subject to a right in A to repurchase it, the wife of B was held dowable if the transaction was not intended as, and in fact amounted to, a mortgage. Chase's Case, 1 Bland, 602.

[5] 2 Bl. Com. 132; Reed *v.* Morrison, 12 S. & R. 18.

[6] Stow *v.* Tifft, 15 Johns. 458; Cunningham *v.* Knight, 1 Barb. 399; Moore *v.* Rollins, 45 Me. 493.

[7] Mayburry *v.* Brien, 15 Pet. 39; Reed *v.* Morrison, 12 S. & R. 18; Webster *v.* Campbell, 1 Allen, 313; Pendleton *v.* Pomeroy, 4 Allen, 510. It is, on the other hand, immaterial that they bear the same date, if the actual execution was at different times. Rawlins *v.* Lowndes, 34 Md. 639.

delivery of the original deed, where it has been done in pursuance of an agreement then made.[1] But if the claim of the mortgagee ceases or fails to grow out of the same transaction that gave the mortgagor his seisin, the doctrine of his lien being prior to that of the wife's dower does not apply. So where the owner of land bargained with another to sell him the land, and gave a bond conditioned to deliver a deed of the premises, but, before executing such deed married, and afterwards made his deed to the purchaser and took back a mortgage to secure the purchase-money, it was held that his wife was entitled to dower out of the land so conveyed.[2]

§ 398. **Where Husband's Seisin is defeasible by Bona Fide Purchaser.** — But the seisin of the husband will not avail to give dower if the property subsequently come to a purchaser for value without notice of such seisin. Thus, where the owner of land conveyed it by deed to the husband, who entered and afterwards reconveyed to his grantor, but neither of these deeds was recorded, and the original grantor then conveyed the estate, by a deed which was recorded, to a person who purchased for a valuable consideration, without notice of such prior conveyance, it was held that whatever seisin had been in the husband was defeated and his wife could not therefore claim dower.[3]

§ 399. **Mortgagee's Wife takes no Dower.** — The seisin of a mortgagee stands on the same footing as the seisin of a trustee (see *ante*, § 393), and will not avail to give dower until and unless the mortgagor's equity of redemption is actually barred by foreclosure in the lifetime of the husband.[4]

§ 400. **Seisin in Equity.** — As for the equitable seisin sufficient to give dower in equitable estates other than equities of

[1] 4 Kent, Com. 141 ; Wheatley *v.* Calhoun, 12 Leigh, 264.

[2] Dimond *v.* Billingslea, 2 Har. & G. 264. In Kentucky, in a similar case, it was held that the wife of the vendee, and not the wife of the vendor, was entitled to dower. But in the latter case the vendee had been put into possession before marriage, though the deed was not given till after. Stevens *v.* Smith, 4 J. J. Marsh. 64. See also Oldham *v.* Sale, 1 B. Mon. 76 ; Gage *v.* Ward, 25 Me. 101.

[3] Emerson *v.* Harris, 6 Met. 475.

[4] Tud. Cas. 47 ; 4 Kent, Com. 43 ; 4 Dane, Abr. 671 ; Foster *v.* Dwinel, 49 Me. 44 ; Cooper *v.* Whitney, 3 Hill, 95, 100. In the case of a lien theory mortgage, the proposition of the text is self-evident ; for the mortgagee has no estate, either legal or equitable, in the land. See statutes *post*, at the end of § 489.

redemption, it is easier to illustrate by decided cases than to state a principle which shall be generally applicable. Thus where the legal estate in lands was vested in trustees to convey to the husband at a particular time, which was during or prior to the coverture, it was held that the wife should have dower in the estate, upon the principle that, in equity, what the law requires to be done is regarded as if it were done, and as the conveyance ought to have been made in the husband's lifetime, it should be treated as if it had been made.[1] The same rule would apply if the husband, by the terms of the trust, had a right to have the estate conveyed to him at any time he chose.[2] But if this right to have conveyance made was the result of contract only between the vendor and purchaser, and to be made on the husband's request, it would not give the purchaser's wife a right to dower if no such request had been made in his lifetime.[3] In Kentucky and Ohio the courts have held a wife entitled to dower under a somewhat similar state of facts, except that the husband had paid the full price for the land, the vendor having thereby become, in equity, trustee for the vendee, bringing them more nearly within the doctrine of the above case of Yeo *v.* Mercereau.[4] But if the land were merely bargained for by the husband, and no deed had been given, although he had taken possession, his widow could not claim dower.[5] Nor could she have dower if her husband, having such agreement or a mere equitable title to the land, have the deed made to a third person, or even to himself as trustee for a third person,[6] especially if by the agreement the conveyance was to be made to the husband or his assigns,

[1] Banks *v.* Sutton, 2 P. Wms. 715; Otway *v.* Hudson, 2 Vern. 583 ; 2 Crabb, Real Prop. 162.

[2] Yeo *v.* Mercereau, 3 Harris (N. J.), 387.

[3] Spangler *v.* Stanler, 1 Md. Ch. Dec. 36.

[4] Robinson *v* Miller, 2 B. Mon. 284 ; Smiley *v.* Wright, 2 Ohio, 506 ; Pugh *v.* Bell, 2 Mon. 125 ; Gillespie *v.* Somerville, 3 Stew. & P. 447. And in a late Virginia case it was held that where a purchaser of land pays a part of the price and goes into possession, he is beneficially seised to the extent of the price paid, and his wife acquires a right of dower subject to the lien for the unpaid balance of the purchase-money. James *v.* Upton, 96 Va. 296 ; s. c. 31 S. E. Rep. 255.

[5] Pritts *v.* Ritchey, 29 Penn. St. 71 ; Barnes *v.* Gay, 7 Iowa, 26.

[6] Heed *v.* Ford, 16 B. Mon. 114, 117 ; Gully *v.* Ray, 18 B. Mon. 107. See Owen *v.* Robbins, 19 Ill. 545 ; Blakeney *v.* Ferguson, 20 Ark. 547 ; Welsh *v.* Buckins, 9 Ohio St. 331.

and he had had it made to a third party.[1] Where A held a contract for land from the State, and contracted with C to convey it to him, and he contracted with S to sell it to him, and S conveyed to the tenant his interest in the land with covenants of title, and the State made a deed to A, and he made a deed to C; after S's death his widow claimed dower in the premises. But the court held that S never had sufficient seisin to support the claim, and that, if he had any seisin, it was instantaneous in favor of the tenant.[2]

§ 401. **Seisin defeated by Husband.** — In such case, however, it would be competent for the husband to defeat his wife's right of dower by releasing or extinguishing his right, which answers to seisin in equity, which he could not have done in respect to his seisin of lands at common law. Thus, in another case in Kentucky, where a husband had made a verbal contract for land and had built thereon, and afterwards bargained it to a third person, and had the deed from the original vendor made directly to his vendee, his wife was not held dowable.[3] It was probably upon this principle that it was held in one case, that if, before marriage, the husband purchases land and gives back a mortgage for the purchase-money, a release of his right of redemption to the mortgagee during coverture defeats any claim of dower.[4] And in another, that, where the condition of the husband's mortgage was broken before marriage and he released his right of redemption during coverture, it barred any right of dower in his wife.[5] In the latter case there was a dissenting opinion by one of the judges, and in those States where the mortgagor is regarded as the holder of the legal estate with its incidents, and the interest of the mortgagee as a lien or pledge only for his debt, the right of dower in such a case would attach, in respect to the mortgagor's estate, to the

[1] Lobdell *v.* Hayes, 4 Allen, 187, 191.

[2] Steele *v.* Magie, 48 Ill. 396.

[3] Herron *v.* Williamson, Litt. Cas. 250.

[4] Jackson *v.* Dewitt, 6 Cow. 316; explained in Mills *v.* Van Voorhis, 23 Barb. 133, 135. See also Reed *v.* Morrison, 12 S. & R. 18. It would make no difference in the barring effect of a release of the right of redemption from a purchase-money mortgage that the conveyance to the husband was during coverture. Building, L. & W. Co. *v.* Fray, 96 Va. 559; s. c. 32 S. E. Rep. 58.

[5] Rands *v.* Kendall, 15 Ohio, 671.

equity of redemption, which he could not by his own deed alone defeat.[1] *

402. **Equitable Seisin, how lost.** — If a trustee convey away the estates in violation of the trust under which he held it, the husband, *cestui que trust*, must apply to the court and have the purchaser declared a trustee, or, if he die before this is done, he will be considered as having been divested of his equitable seisin, and his wife cannot claim her dower.[2]

§ 403. **Equities of Redemption.** — In recurring to dower in equities of redemption, it will be found that the law upon the subject is somewhat peculiar. The widow's right has a double aspect: as to all the world, except the mortgagee and his assigns, it is as if no mortgage had ever been made. The mortgagor has the legal estate in the land. The widow may have her action at law to recover her dower, with damages for its detention, just as if the estate were unincumbered; nor would it be competent for the tenant to resist her claim on the ground that a stranger holds an outstanding mortgage upon the premises, unless he claims title through such stranger.[3] But if a tenant is sued in an action to recover the land, he may, by a proper plea, set up in defence to such suit a seisin in fee in a stranger, although he do not claim under him; for, if the demandant have no right, he cannot draw in question the tenant's right.[4] Nor does it make any difference in this respect whether the mortgage was made before her marriage or was executed by her with her husband during coverture. As

* Note. — The subject of the wife's right to be endowed out of estates purely equitable has been somewhat considered in a former part of this treatise, to which, and the cases there cited, the reader may be referred for something more on the subject of what is sufficient to give such an equitable seisin as will entitle a widow to dower; *ante*, § 374 *et seq.*

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[1] See Yeo *v.* Mercereau, 3 Harris (N. J.), 387; McArthur *v.* Franklin, 15 Ohio St. 507.

[2] Thompson *v.* Thompson, 1 Jones (N. C.), 430.

[3] Collins *v.* Torry, 7 Johns. 278; Smith *v.* Eustis, 7 Me. 41; Young *v.* Tarbell, 37 Me. 509; Whitehead *v.* Middleton, 2 How. (Miss.) 692; Taylor *v.* Fowler, 18 Ohio, 567; Eaton *v.* Simonds, 14 Pick. 98; Fay *v.* Cheney, 14 Pick. 399; Brigham *v.* Winchester, 1 Met. 390; Hitchcock *v.* Harrington, 6 Johns. 290; Hastings *v.* Stevens, 29 N. H. 564; Moore *v.* Esty, 5 N. H. 479; Jackson *v.* Dewitt, 6 Cow. 316; Savage *v.* Dooley, 28 Conn. 411.

[4] Wolcott *v.* Knight, 6 Mass. 418; Stearns, Real Act. 226.

against the mortgagee and those claiming under him, the claim of a widow where the mortgage is made before marriage, or by her joining during coverture, is equitable alone. She cannot recover the dower against him, though in possession, by a suit at law.[1]

§ 404. **Effect of Foreclosure.** — If the mortgage shall have been properly foreclosed, all claim on her part is gone at law.[2] But equity will give her dower in the surplus over the mortgage debt.[3]

§ 405. **Effect of Redemption.** — On the other hand, if the mortgage shall have been so paid or redeemed as to constitute no longer a lien upon the premises, the tenant cannot avail himself of it, though standing in his own name, in defence to the wife's claim of dower.[4] Whether a mortgage in any given case is or is not a subsisting outstanding lien and incumbrance upon an estate, so as to affect the dower right of the wife of the mortgagor or his assignee, often presents questions of great difficulty. Sometimes it has been attempted to determine the question by inquiring whether the party who sets up the mortgage has obtained a property in it by a formal assignment. At other times it has been held important that there has been a formal discharge or release of the mortgage by the holder thereof, upon being paid the mortgage debt. It is apprehended that neither of these is a test which can always be relied on, since courts of equity, in which such questions usually arise, will go behind the form to reach the substantial equities of the parties.[5]

§ 406. **Effect of Payment of Mortgage by Assignee of Equity of Redemption.** — If the purchaser of an estate which is subject to a mortgage pay it off to save his estate from forfeiture, without any legal obligation on his part to do so, he may stand on his title as mortgagee. And if he has the mortgage assigned to him, the widow of the mortgagor, in order to claim dower, must

[1] Gibson *v.* Crehore, 3 Pick. 475; s. c. 5 Pick. 146; Eaton *v.* Simonds, 14 Pick. 98; Farwell *v.* Cotting, 8 Allen, 211.

[2] Stow *v.* Tifft, 15 Johns. 458; Reed *v.* Morrison, 12 S. & R. 18.

[3] See *ante*, § 377; *post*, § 479.

[4] Hitchcock *v.* Harrington, 6 Johns. 290; Wade *v.* Howard, 6 Pick. 492.

[5] Niles *v.* Nye, 13 Met. 135; Simonton *v.* Gray, 34 Me. 50. See Newton *v.* Cook, 4 Gray, 46.

pay him the entire mortgage debt, if he requires it. If he has the mortgage discharged, she may, in Massachusetts, have her dower out of the equity of redemption, or may contribute her proportion of the redemption money, and have it set out to her in the whole estate. If, on the other hand, the mortgage debt be paid out of the property of the mortgagor, or by the person who owes the debt, it is a satisfaction of the mortgage, and discharges it, and lets in the widow's claim to dower. So, where the purchaser assumes to pay the debt as his own, or the mortgagor when selling the estate leaves enough of the purchase-money in the vendee's hands to satisfy the debt, and the purchaser pays it, the effect on the widow's dower would be the same. Nor would it make any difference in this respect if, when he paid the debt, he took an assignment of the mortgage. He could not set it up against her claim.[1]

§ 407. **Effect of satisfying Mortgages.** — If, therefore, a mortgage has been paid and satisfied by some one whose duty it was to pay it, by reason of acting for or holding under the mortgagor, with an agreement express or implied to pay the same, he could not hold it as an outstanding title or incumbrance upon the land, although he might take ever so formal an assignment of the instrument to himself. On the other hand, where a purchaser of an estate upon which there is an outstanding mortgage, in order to protect his own estate, yields to the demand of the holder of the mortgage and pays it, he may, as against others whose estates he has thereby relieved, be deemed an equitable assignee of the mortgage without any formal assignment, depending upon the intention with which this is done.[2] Whether the particular case should fall within one category or the other above stated often depends upon the circumstances of such case, so that it becomes a question of fact quite as much as of law, to determine whether a mortgage is an outstanding incumbrance or not. Some general principles upon this point have been laid down by courts which may aid in determining the law in any given case. Thus, it has been held that, if a

[1] McCabe *v.* Swap, 14 Allen, 188; Hatch *v.* Palmer, 58 Me. 271; Putnam *v.* Collamore, 120 Mass. 454; Thompson *v.* Heywood, 129 Mass. 401.

[2] James *v.* Morey, 2 Cow. 246; Gibson *v.* Crehore, 3 Pick. 475; Simonton *v.* Gray, 34 Me. 50; Strong *v.* Converse, 8 Allen, 557; Hinds *v.* Ballou, 44 N. H. 619; Toomey *v.* McLean, 105 Mass. 122; Carlton *v.* Jackson, 121 Mass. 592.

mortgage is paid and discharged by the mortgagor or his assigns, it shall enure to the benefit of his widow in the matter of dower, and, her right reviving, she may recover just as if no mortgage had existed.[1] So if it be paid after the husband's death by his administrator.[2] As the mortgagor, who is supposed to have had the benefit of the mortgage-money, is, if he discharge the mortgage, not allowed to call upon another for contribution, having only paid his own debt, so if the mortgaged estate is bought by a stranger under such circumstances as to show that he only paid for the excess of its value over the mortgage, or so that one part of the estate satisfies the charge upon the whole, the widow of the mortgagor will be let in to claim dower at law, if such purchaser shall obtain a discharge of the mortgage.[3] Thus, where the husband's right in equity was taken and sold upon execution, and the purchaser paid the mortgage and had it discharged, the wife had dower as of an unincumbered estate.[4] And in the case of Barker *v.* Parker,[5] just cited, the same consequence followed as to the wife's dower, though the mortgage debt was paid by a stranger, and the holder of the mortgage released to the mortgagor. In another case the husband gave a mortgage to secure the purchase-money of certain lands, in which his wife joined. He afterwards sold a portion of these to a third person, who agreed to apply the purchase-money in discharging the first mortgage. The wife signed this deed, but it contained no words of grant or release on her part. The purchaser paid the first mortgage, and the holder discharged it upon record; and, on the death of the husband, it was held that she was entitled to dower against this second purchaser,

[1] Wedge *v.* Moore, 6 Cush. 8; Bolton *v.* Ballard, 13 Mass. 227; Snow *v.* Stevens, 15 Mass. 278; Bullard *v.* Bowers, 10 N. H. 500; Coates *v.* Cheever, 1 Cow. 460; Hitchcock *v.* Harrington, 6 Johns. 290; Collins *v.* Torry, 7 Johns. 278; Gibson *v.* Crehore, 3 Pick. 475. So where the mortgagee redeemed from a tax sale. Walsh *v.* Wilson, 130 Mass. 124.

[2] Hildreth *v.* Jones, 13 Mass. 525; Mathewson *v.* Smith, 1 R. I. 22; Rossiter *v.* Cossit, 15 N. H. 38; Hastings *v.* Stevens, 29 N. H. 564; Klinck *v.* Keckley, 2 Hill, Ch. 250; Hatch *v.* Palmer, 58 Me. 271. So where paid by the heir who has given the statutory bond to pay all debts and legacies. King *v.* King, 100 Mass. 224.

[3] Gibson *v.* Crehore, 5 Pick. 146.

[4] Eaton *v.* Symonds, 14 Pick. 98; Barker *v.* Parker, 17 Mass. 564.

[5] 17 Mass. 564.

and that the transaction did not operate to give him the rights of equitable assignee of the mortgage.[1] In all such cases, therefore, if it be the intention of the party paying a mortgage to retain it as a lien upon the land, he should have it formally assigned to him so that he may stand in the place of the mortgagee, if he holds under such circumstances that law or equity will regard him as assignee. If, instead of that, he actually cause the mortgage to be discharged, the lien upon the estate is, with some exceptions, gone and extinct as if it never existed.[2]

§ 408. **Effect of Merger of Legal and Equitable Estates.** — Whether such a union of the legal and equitable estates as would arise, if the assignee of the mortgagor acquired the interest of the mortgagee by assignment, would or would not operate as a merger, would depend upon whether the holder of the two had an interest to prevent the merger.[3] In considering the subject of merger where the legal and equitable estates unite in the same person, the result above stated is one which is sustained by equity rather than law. At law such a coming together of the respective interests of mortgagor and mortgagee works a merger of the mortgagee's in that of the mortgagor, or perhaps more properly operates as a discharge of the mortgage, especially if it take place during the life of the mortgagor, and consequently it would let in the right of the mortgagor's wife to dower in the estate.[4] Whereas this rule is not inflexible with courts of equity, but will depend on the intention and interest of the person in whom the estates unite.[5]

§ 409. **When Dower not affected by Discharge of Mortgage.** — And where the two estates were subsisting separately at the

[1] Carter *v.* Goodin, 3 Ohio St. 75.

[2] Russell *v.* Austin, 1 Paige, 192; James *v.* Morey, 2 Cow. 246; Freeman *v.* Paul, 3 Me. 260; Young *v.* Tarbell, 37 Me. 509; Smith *v.* Stanley, 37 Me. 11; Gibson *v.* Crehore, 3 Pick. 475; Wedge *v.* Moore, 6 Cush. 8; Wade *v.* Howard, 6 Pick. 492; Hastings *v.* Stevens, 29 N. H. 564.

[3] James *v.* Morey, 2 Cow. 246; Gibson *v.* Crehore, 3 Pick. 475.

[4] Coates *v.* Cheever, 1 Cow. 460; Reed *v.* Morrison, 12 S. & R. 18; Runyan *v.* Stewart, 12 Barb. 537; Collins *v.* Torry, 7 Johns. 278; Snow *v.* Stevens, 15 Mass. 278.

[5] Eaton *v.* Simonds, 14 Pick. 98; James *v.* Morey, 2 Cow. 246. See *post*, § 411.

death of the mortgagor, the effect of a discharge of the mortgage, unless by the executor or administrator of the mortgagor, or of the union of the two by a redemption of the mortgage, would not be to give the wife dower as of an unincumbered estate.[1] And the reason of this distinction is this: During the life of the husband, the wife is not bound to contribute towards the redemption of the mortgage, and is not therefore to be charged therewith, whoever may redeem. But upon her husband's death she takes her interest in the estate, if at all, charged with the mortgage, and if any one interested in the estate as heir or purchaser discharge or redeem the mortgage, he thereby acquires an equitable lien upon the estate, which he may hold against the widow till she contributes her proportion of the charge according to the value of her interest.[2] But in either contingency, nothing but a payment in fact, or an actual release of the mortgage, will operate to discharge it so as to let in the claim of dower at common law.[3]

§ 410. **Mortgagor's Widow must seek Equitable Relief.** — And if the mortgagee is in possession of the mortgaged premises for condition broken, or the purchaser of the equity of redemption who has redeemed the mortgage, the widow's remedy for the recovery of her dower is by a bill in equity only, as she cannot maintain a writ of dower until she has contributed her share of the redemption money, as will be hereafter more fully considered.[4] Chief Justice Shaw explains in what cases and under what circumstances a wife who has joined with her husband in a mortgage may avail herself of her right of dower as against such mortgage.[5] This will be the case (1) where the debt shall be paid or satisfied by the husband, or by some one acting in his behalf and in his

[1] Hildreth *v.* Jones, 13 Mass. 525.

[2] Eaton *v.* Simonds, 14 Pick. 98, in which Popkin *v.* Bumstead, 8 Mass. 491, is explained; Swaine *v.* Perine, 5 Johns. Ch. 482; Gibson *v.* Crehore, 5 Pick. 146; Strong *v.* Converse, 8 Allen, 560; Richardson *v.* Skolfield, 45 Me. 386.

[3] Crosby *v.* Chase, 17 Me. 369; Farwell *v.* Cotting, 8 Allen, 211.

[4] Van Dyne *v.* Thayre, 14 Wend. 233; Smith *v.* Eustis, 7 Me. 41; Carll *v* Butman, id. 102; Cass *v.* Martin, 6 N. H. 25; Richardson *v.* Skolfield, *supra;* Niles *v.* Nye, 13 Met. 135; Rossiter *v.* Cossit, 15 N. H. 38.

[5] Brown *v.* Lapham, 3 Cush. 551; Strong *v.* Converse, 8 Allen, 559.

right, so that the mortgage is extinguished, — the whole object and purpose in giving it having been accomplished; (2) by redemption, — paying the debt herself, though this can only be enforced as a right by a process in equity, and by tendering the payment of the mortgage debt. Unless one of these shall have been done, the demandant cannot maintain an action of dower against any person holding the rights of the mortgagee; the only remedy is in equity.[1] In order to have a payment operate to discharge and extinguish a mortgage, it must be made by the husband, or out of the husband's funds, or by some one as personal representative, assignee, or standing in some other relation which, in legal effect, makes him mortgagor and debtor, and one whose duty it is to pay and discharge the mortgage debt. Whether a given transaction shall be held, in legal effect, to operate as a payment or discharge which extinguishes the mortgage, does not depend upon the form of words used, so much as upon the relations subsisting between the parties advancing the money and the party executing the transfer or the release, and their relative duties. If the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel the mortgage and relieve the mortgaged premises of the lien, — a duty in the proper performance of which others have an interest, — it shall be held to be a release and not an assignment, although in form it purports to be an assignment. When no such controlling obligation or duty exists, such an assignment shall be held to be an extinguishment or assignment according to the intent of the parties, and their respective interests in the subject will have a strong bearing upon the question of such intent.[2]

§ 411. **Effect of Discharge of Mortgage.** — The time of discharge may raise a presumption of merger. Thus where A mortgaged to B, C, and D successively, his wife joining in the second only, D paid up the debts of B and C during the life of A, and had their mortgages discharged, and then conveyed the whole estate with warranty to the tenant; in a suit

[1] Thompson *v.* Boyd, 22 N. J. L. 543 ; Watson *v.* Clendenin, 6 Blackf. 477.

[2] Robinson *v.* Leavitt, 7 N. H. 73, 98 ; Adams *v.* Hill, 29 N. H. 202 ; Thompson *v.* Boyd, 21 N. J. 58 ; s. c. 22 N. J. 543 ; Simonton *v.* Gray, 34 Me. 50. See also Tucker *v.* Crowley, 127 Mass. 400 ; and *ante*, § 405 ; *post*, § 1121.

for dower at law, it was held that this let in the widow to dower. The presumption in such case would be, that the party who thus redeemed took the estate subject to the prior charges and paid for it accordingly, and assumed the discharge of them as a duty.[1]

§ 412. **Formal Discharge not conclusive.** — But, after all, the form of the transaction or the time of doing it is not conclusive, since it depends much, if not altogether, upon the intent with which it is done. If it is the intent, on the part of the person paying the mortgage debt, to become substituted to the place and with the rights of the mortgagee, instead of technically extinguishing the mortgage, it would not relieve the widow of the mortgagor from contributing her share of the mortgage debt, or making a proper abatement on account thereof.[2] Where the wife joined her husband in a mortgage, and the husband having become bankrupt, his assignee purchased and took an assignment of the mortgage, and then sold the estate in parcels; it was held not to be a discharge of the mortgage, and that the widow could not claim dower out of the estate, except by a bill in equity and an offer to redeem from the mortgage.[3]

§ 413. **Presumptions in Favor of Widow.** — Certain legal presumptions may arise in favor of a widow claiming dower. If the husband is in possession of lands, claiming ownership of them, it is sufficient *prima facie* evidence of right of dower in his widow.[4] And where A bought an estate in the name of his son, who entered into possession and died, it was held that, though as between the son and father there was a resulting trust in favor of the father by implication,[5] the widow of the son was entitled to dower, the legal estate having been in

[1] Wedge *v.* Moore, 6 Cush. 8. See Runyan *v.* Stewart, 12 Barb. 537; Smith *v.* Stanley, 37 Me. 11.

[2] Mass. Pub. Stat. c. 124, § 5; Newton *v.* Cook, 4 Gray, 46; Pynchon *v.* Lester, 6 Gray, 314; McCabe *v.* Bellows, 7 Gray, 148; Barbour *v.* Barbour, 46 Me. 9; Toomey *v.* McLean, 105 Mass. 122.

[3] Sargent *v.* Fuller, 105 Mass. 119.

[4] Mann *v.* Edson, 39 Me. 25; Torrence *v.* Carbry, 27 Miss. 697; Carpenter *v.* Weeks, 2 Hill, 341; Forrest *v.* Trammell, 1 Bailey, 77; Moore *v.* Esty, 5 N. H. 479; Knight *v.* Mains, 12 Me. 41; Griggs *v.* Smith, 12 N. J. 22; Reid *v.* Stevenson, 3 Rich. (S. C.) 66.

[5] Hill, Trust. 91; *post*, § 1424.

him, and the trust in favor of the father being fraudulent as against creditors and purchasers.[1] If, however, the possession of the husband turns out to be under a contract of purchase, but no deed has been made, it has been held, in Maine, that his wife cannot claim dower, although the purchase-money has been paid.[2] But in North Carolina such a possession has been held sufficient to give the wife dower.[3] So a sufficient legal seisin is often inferred from the fact that the tenant holds his title to the estate mediately or immediately from the husband, by a deed from him or his heir. And it may not be necessary to show that the tenant holds by title derived from the husband, any further than that the husband was once seised and conveyed the estate by deed. Thus, it was held that by proving the execution and delivery of a deed of the premises to the husband, that he was during coverture in possession of them, and that he aliened them during coverture, the title of the tenant would be presumed to be the same under which the husband held, if no evidence of any other title on his part is offered.[4] The rigid rules of law in requiring proof of a better title against a stranger in possession of real estate do not apply between a widow claiming dower and the tenant. If it appear that the tenant holds by deed from the husband, or from his son and heir, or by a levy of a *fi. fa.* against the husband, who held a deed in fee of the premises, it will be sufficient evidence, if uncontrolled, to establish his wife's claim for dower.[5] But if the tenant claims under a deed from the mortgagee, he will not be estopped thereby, if the widow of his grantor claims dower, to show that her husband's interest was only that of a mortgagee.[6]

[1] Bateman *v.* Bateman, 2 Vern. 436; 2 Crabb, Real Prop. 163.

[2] Hamlin *v.* Hamlin, 19 Me. 141; Hamblin *v.* Bank of Cumberland, 19 Me. 66.

[3] Thompson *v.* Thompson, 1 Jones (N. C.), 430.

[4] Wall *v.* Hill, 7 Dana, 172; Carter *v.* Parker, 28 Me. 509; Lewis *v.* Meserve, 61 Me. 374.

[5] Hitchcock *v.* Harrington, 6 Johns. 290; Dolf *v.* Basset, 15 Johns. 21; Hyatt *v.* Ackerson, 14 N. J. 564; Kimball *v.* Kimball, 2 Me. 226; Norwood *v.* Marow, 4 Dev. & B. 442; Randolph *v.* Doss, 4 Miss. 205; Embree *v.* Ellis, 2 Johns. 119; Collins *v.* Torry, 7 id. 278; Bordley *v.* Clayton, 5 Harringt. 154; Douglass *v.* Dickson, 11 Rich. (S. C.) 417; Cochrane *v.* Libby, 18 Me. 39.

[6] Foster *v.* Dwinel, 49 Me. 44. This doctrine was held to apply to a case where the execution creditor, after levying upon the debtor's estate, quitclaimed it to

§ 414. **Estoppel in Favor of Widow.** — And in many cases the courts have gone much further than to hold the possession of land acquired by title from the husband *prima facie* evidence of a right of dower on the part of his widow. A tenant has been held to be estopped to deny the seisin of the husband, or the husband's death, if the title is derived from his heir. Thus, where the tenant held by a deed from two grantors, one of whom died, and his widow brought suit for dower, it was held that the tenant could not show by parol that the interest and estate of the deceased grantor in the premises granted was less than one half, in order to reduce the share out of which she might claim her dower.[1] An heir is estopped to deny the seisin of his father in lands which descended to him, to a claim by his mother for dower therein.[2] And where a tenant claimed under the heir of the husband, it was held that he could not deny the death or seisin of the husband, in an action by his widow to recover her dower.[3] So where the widow, as executrix of her husband's will, conveyed the estate to the tenant, subject to her right of dower, it was held that he was estopped to deny the husband's seisin.[4] And where she proved a deed to her husband, and one with warranty from him, followed by a deed from his grantee to the tenant, it was held sufficient to establish the husband's seisin.[5]

§ 415. **Feoffee estopped to deny Feoffor's Seisin.** — It is settled law that if a tenant at will, for years, or for life, make a feoffment, the feoffee cannot set up a want of seisin on the part of the feoffor, in an action brought by his wife to recover

another within the time in which the debtor had a right to redeem. Foster *v.* Gordon, 49 Me. 54.

[1] Stimpson *v.* Thomaston Bk., 28 Me. 259.

[2] Griffith *v.* Griffith, 5 Harringt. 5.

[3] Hitchcock *v.* Carpenter, 9 Johns. 344; Hitchcock *v.* Harrington, 6 Johns. 290; Montgomery *v.* Bruere, 4 N. J. 260.

[4] Smith *v.* Ingalls, 13 Me. 284.

[5] Thorndike *v.* Spear, 13 Me. 91; Davis *v.* Millett, 34 Me. 429; and for other decisions on the same lines, see Hale *v.* Munn, 4 Gray, 132; Bolster *v.* Cushman, 34 Me. 428; Bancroft *v.* White, 1 Caines, 185; Embree *v.* Ellis, 2 Johns. 119; Ward *v.* Fuller, 15 Pick. 185; Hains *v.* Gardner, 10 Me. 383; English *v.* Wright, 1 N. J. 437; Thompson *v.* Thompson, 19 Me. 235; Osterhout *v.* Shoemaker, 3 Hill, 519.

her dower.[1] Nor would he be admitted to show that such seisin was only colorable, and designed to defraud the creditors of him from whom the husband derived his seisin.[2] And where the husband, being seised of a remainder expectant upon a life estate, mortgaged the land in fee, and died, and his wife claimed dower against the mortgagee, it was held that he could not set up a want of seisin in the husband against her claim.[3] But whether this rests upon the doctrine of estoppel alone, is a question upon which the authorities are divided.[4] In some of the cases where the tenant holds under the husband, he has been held to be estopped, as already stated, from denying the husband's seisin.[5] Thus, where the only title of the tenant was a deed of warranty from the husband, he was not permitted to show that the husband, in fact, had no title to a part of the premises. As the husband's deed was his only title, "he is therefore estopped from denying his grantor's seisin."[6] On the other hand, it has been held in Arkansas that the vendee of the husband is not estopped, in an action to recover dower, from showing affirmatively a want of seisin in the husband.[7] In Maine, though the tenant who held under the husband was not permitted, in an action brought by his grantor's widow, to deny the seisin of the husband, yet he was permitted to deny that it was such a seisin as gave his widow a right of dower.[8] So, in Kentucky, the tenant, though he purchased of and entered originally under the husband, may contest the widow's claim of dower by showing that he has acquired and holds under a superior title to that of the husband, provided he goes further and shows that he was evicted, by act of law, from the seisin acquired under the husband, before he acquired the title

[1] Taylor's Case, cited 6 Johns. 293; Tud. Cas. 44.

[2] Kimball *v.* Kimball, 2 Me. 226.

[3] Nason *v.* Allen, 6 Me. 243.

[4] Moore *v.* Esty, 5 N. H. 479.

[5] Pledger *v.* Ellerbe, 6 Rich. 266. So in Iowa. Davis *v.* O'Ferrall, 4 G. Greene, 358.

[6] Wedge *v.* Moore, 6 Cush. 8; Gayle *v.* Price, 5 Rich. 525; May *v.* Tillman, 1 Mich. 262; Thompson *v.* Boyd, 22 N. J. 543.

[7] Crittenden *v.* Woodruff, 11 Ark. 82.

[8] Gammon *v.* Freeman, 31 Me. 243.

under which he now claims to hold and defend.[1] In one case in New York, which carried the doctrine to an extreme length, the court refused to permit the tenant to defend, by showing that, when the husband conveyed to him, there was a superior title in another, which he, the tenant, had since acquired and still held, unless the seisin and possession derived from the husband had been defeated by actual eviction of the tenant.[2] The court laid great stress upon the analogy between the grantee of the husband resisting the claim of the grantor's widow, and a lessee contesting the title of his lessor, in an action to recover the premises on the expiration of the lease; and carried the principle so far, that, although the tenant purchased and took a conveyance from one who held the paramount and true title, and who had commenced an action against him to recover the premises, yet he was not permitted to avail himself of this unless he had been actually evicted. But the tendency of more recent cases has been to apply a more liberal rule in respect to estoppels in like cases. Thus it is now generally held, that a tenant need not be actually evicted by one having a better title, in order to be allowed to deny that of his landlord. If he has yielded in good faith to such better title in order to avoid being expelled, and the true owner has entered and given permission to him to hold under him, he may avail himself of this in an action against him by the original lessor to recover possession.[3] So in Illinois, the grantee of a husband was admitted to deny the husband's title and seisin, and to show that he claims under another title; while in Kentucky he may show the true nature of the husband's seisin, and that it was not such as to entitle his widow to dower.[4]

§ 416. **When Tenant is not estopped.** — And in a more recent case in New York, where, in an action to recover dower of a tenant, to whom the husband had conveyed the premises by a grant in fee with covenants of warranty, the tenant offered to show that the husband had only a leasehold estate in the

[1] Hugley *v.* Gregg, 4 Dana, 68.

[2] Bowne *v.* Potter, 17 Wend. 164.

[3] Morse *v.* Goddard, 13 Met. 177; Taylor, Land. & T. §§ 707, 708; Emery *v.* Barnett, 4 C. B. N. S. 423.

[4] Owen *v.* Robbins, 19 Ill. 545; Gulley *v.* Ray, 18 B. Mon. 114.

premises, the court held that he was not estopped to set up this in defence.[1] The court say that for forty years the settled doctrine had been that he was estopped, but the former cases, including that from Wendell, had been overruled by the case of Sparrow *v.* Kingman.[2] And the law of New York may be considered as now settled accordingly. Nor is there anything in the Massachusetts cases inconsistent with the doctrine of the two last-cited cases, while the modern English cases seem to be in accordance therewith.[3] Nor will it make any difference whether the title derived by the tenant from the husband was by a deed of quitclaim or warranty.[4]

§ 417. **Death of Husband.** — The last requisite in order to entitle a woman to dower is the natural death of her husband. There was once known in England what was called a civil death, as when a man became a monk, but that did not give his wife a right to recover dower.[5] Nothing answering to civil death is known to the American law.

[1] Finn *v.* Sleight, 8 Barb. 401.

[2] 1 N. Y. 242.

[3] Gaunt *v.* Wainman, 3 Bing. N. C. 69.

[4] Kingman *v.* Sparrow, 12 Barb. 201.

[5] 2 Crabb, Real Prop. 131. In claims for dower, as in other cases, the husband's death may be proved presumptively by seven years' absence without intelligence concerning him. Sherod *v.* Elwell, 104 Iowa, 253 ; s. c. 73 N. W. Rep. 493.

CHAPTER XIII.

DOWER — HOW LOST OR BARRED.

§ 418. Alienage and treason.
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420. Divorce.
421. Forfeiture by conveyance.
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444. Effect of release of first widow.
445. When the husband's estate determines.
446. Same subject — Estates on conditional limitation.
447. Barred by jointure.
448. Presumption of release by lapse of time.
449. Statute of limitations.
450. Statutory provisions for barring dower.
451. Statutory changes in the right of dower.
452. Barred by eminent domain.

§ 418. **Alienage and Treason.** — At common law, alienage on the part of the husband or wife was a disability to her claiming dower.[1] By a very early statute, if an alien woman mar-

[1] 2 Bl. Com. 131; 2 Crabb, Real Prop. 131.

ried a British subject by the king's license, she might claim dower.[1] And now, by the statute 7 & 8 Vict. c. 66, if an alien woman marry an English subject, she becomes naturalized. A similar doctrine now prevails under the naturalization laws of the United States. This disability is done away with by the local statutes of several of the States.[2] By the common law also, the widow of a convicted traitor could not recover dower.[3] But it is believed that no such principle was ever introduced into the law of this country.[4] And even in the acts of confiscation passed by the legislatures during the American Revolution, the rights of dower of offending parties were excepted.[5]

§ 419. **Elopement.** — By the early statute of Westminster 2,[6] if a wife elope with another man and live in adultery with him, she thereby forfeits her dower in her husband's estate; and this, without any formal divorce, may be shown upon the trial in an action for the recovery of her dower.[7] After such an elopement the husband is not bound to receive her back again.[8] But if he voluntarily receive her back by what is called a reconcilement, she will thereby be restored not only to a right of dower in all the lands of which he had been seised during coverture before her elopement, but to the lands which her husband had bought and sold during her elopement.[9] The leaving of her husband against her consent will not operate to bar her dower, unless she afterwards voluntarily commit adultery.[10] Nor would she forfeit it by living with a man to whom she had been married under a mistaken belief that her first husband was dead, if she had good cause to believe he was dead.[11] If, however, she and her husband voluntarily separate, and while living apart she commit adul-

[1] Co. Lit. 31 *b*, n. 9.

[2] See *ante*, § 132.

[3] 2 Bl. Com. 131.

[4] Wms. Real Prop. 103, n.

[5] Stearns, Real Act. 287 ; Sewall *v.* Lee, 9 Mass. 363 ; Cozens *v.* Long, 2 Penningt. 559. And see 12 U. S. Stat. at Large, 627 ; Wallach *v.* Van Riswick, 92 U. S. 202 ; Pike *v.* Wassell, 94 U. S. 711.

[6] 13 Ed. I. c. 34.

[7] Tud. Cas. 51.

[8] Govier *v.* Hancock, 6 T. R. 603.

[9] Co. Lit. 33 *a*, n. 8.

[10] 2d Inst. 434 ; Coggswell *v.* Tibbetts, 3 N. H. 41.

[11] 2 Crabb, Real Prop. 173 ; 1 Cruise, Dig. 175, 176.

tery, she will forfeit her dower.[1] As this ground of forfeiture depends entirely upon the statute of Westminster, it is not enough that she commit adultery; she must have eloped from her husband.[2] Where, therefore, in the absence of her husband she committed adultery at the place of her and her husband's home, it was held not to be the ground of such a forfeiture.[3] The statute of Westminster has been re-enacted in substance in several of the States, as in Virginia, Missouri, North Carolina, New Jersey, Ohio, Kentucky, West Virginia, and South Carolina.[4] And it seems to have been recognized as a part of the American common law, where no such re-enactment has been made in terms,[5] though it has been held not to be in force in Massachusetts,[6] New York,[7] Delaware, Rhode Island, Iowa, and Maine.[8]

§ 420. **Divorce.** — A divorce from the bonds of matrimony always defeats the right of dower, unless it be saved by the *lex rei sitæ;* for, at common law, in order to entitle a widow to dower, she must have been the wife of the husband at the time of his decease.[9] It is accordingly provided in the stat-

[1] Hethrington *v.* Graham, 6 Bing. 135.

[2] Coggswell *v.* Tibbetts, 3 N. H. 41; 2d Inst. 435.

[3] Coggswell *v.* Tibbetts, 3 N. H. 41.

[4] Stegall *v.* Stegall, 2 Brock. 256; Lecompte *v.* Wash, 9 Mo. 547; Walters *v.* Jordan, 13 Ired. 361. See note at end of § 489.

[5] 4 Dane, Abr. 676; 4 Kent, Com. 53; Bell *v.* Nealy, 1 Bailey, 312; 1 Cruise, Dig. 156, n., 175, n.; Reel *v.* Elder, 62 Penn. St. 308; Heslop *v.* Heslop, 82 Penn. St. 537; Henderson *v.* Chaires, 25 Fla. 26; s. c. 6 So. Rep. 164; Payne *v.* Dotson, 81 Mo. 145.

[6] Lakin *v.* Lakin, 2 Allen, 45.

[7] Reynolds *v.* Reynolds, 24 Wend. 193; Pitts *v.* Pitts, 52 N. Y. 593.

[8] Rawlins *v.* Buttel, 1 Houst. 224; Bryan *v.* Batcheller, 6 R. I. 543; Smith *v.* Woodworth, 4 Dill. 584; Littlefield *v.* Paul, 69 Me. 527; and the same was true in the Territory of Missouri. Lecompte *v.* Wash, 9 Mo. 551.

[9] Bishop, Mar. & Div. §§ 661, 662; 2 Bl. Com. 130; 4 Kent, Com. 54; Wait *v.* Wait, 4 Barb. 192; Whitsell *v.* Mills, 6 Ind. 229; McCraney *v.* McCraney, 5 Iowa, 232; Watt *v.* Corey, 76 Me. 85; Barrett *v.* Failing, 111 U. S. 523; Wood *v.* Wood, 59 Ark. 441; s. c. 27 S. W. Rep. 641; s. c. 43 Am. St. Rep. 42; Carr *v.* Carr, 92 Ky. 552; s. c. 18 S. W. Rep. 453; Pullen *v.* Pullen, 52 N. J. Eq. 9; s. c. 28 Atl. Rep. 719. Whether a divorced wife can be endowed of lands in one State, under a statute of that State, having been divorced in another, depends upon the construction to be given to the statute. The decree has no extra-territorial force. Barrett *v.* Failing, *supra*, reviewing the cases on this point. A statutory saving of dower upon divorce may have the effect to give dower to more than one widow, if the divorced husband remarry. Stahl *v.* Stahl, 114 Ill. 375; s. c.

utes of the States in which such divorces are granted, that dower, or some reasonable provision out of the husband's estate, shall be enjoyed by the wife, unless she is the party in fault.[1]

§ 421. **Forfeiture by Conveyance.** — By the common law, a widow, like other tenants for life, forfeited the dower already set out to her, by conveying, in fee, the lands assigned to her, upon the feudal idea that by so doing she renounced her obligation to her superior.[2] And by statute 6 Edw. I. c. 7, it was expressly provided, that if tenant in dower made a feoffment of her lands to another, with livery of seisin, of a greater estate than she possessed, it worked a forfeiture, since the effect of it was to divest the reversioner of his seisin, and turned his estate into a right of entry.[3] But as by the statute 8 & 9 Vict. c. 106, § 4, feoffments are no longer deemed to have any tortious operation upon the rights of others, the statute 6 Edw. I. is virtually done away with.[4] And it was always competent for her to convey so much estate as she had.[5] And if her conveyance of a greater estate was by deed taking its effect from the statute of uses, it did not work a forfeiture. Nor has the doctrine of forfeiture by conveying a larger estate than belonged to her ever obtained, to any general extent, in this country,[6] [a conveyance in fee having no other effect than to pass the estate which she may lawfully convey.[7]]

§ 422. **Effect of Husband's Conveyance.** — There were various ways by which a wife might bar her inchoate right of dower during coverture by releasing the same. But no conveyance by the husband could, by the common law, cut off her right of dower, or charge it with incumbrances of his creation during their coverture,[8] so that after his decease she took her

2 N. E. Rep. 160. A divorce *a mensa* has no effect to bar dower. Taylor *v.* Taylor, 93 N. C. 418.

[1] Bishop, Mar. & Div. § 663 ; Davol *v.* Howland, 14 Mass. 219. See note as to statute provisions on the subject at the end of § 489.

[2] Wms. Real Prop. 121 ; 4 Kent, Com. 82.

[3] 4 Kent, Com. 83 ; 2 Bl. Com. 136.

[4] Wms. Real Prop. 122.

[5] 2d Inst. 309 ; Wms. Real Prop. 25, n.

[6] Wms. Real Prop. 25, n.

[7] Robinson *v.* Miller, 1 B. Mon. 88 ; Mason *v.* Mason, 140 Mass. 63.

[8] Park, Dow. 237; Rank *v.* Hanna, 6 Ind. 20.

dower lands discharged of all such conveyances or incumbrances.[1] And where the husband made a mortgage in which the wife joined, and afterwards released his interest in the estate, it was held not to cut off her right of dower in the equity of redemption.[2] The law as to the right of the husband to cut off the widow's right of dower by his own deed has been essentially changed in England and in several of the United States, as will hereafter be shown. But still, if the deed of the husband might be avoided for usury, the interest of the widow in the estate is so immediate that she may avail herself of this, and claim her dower, without waiting for his heirs to avoid the conveyance altogether.[3] How far the deed of a husband, where by law his wife is only dowable of such lands as he dies seised of, shall be effectual to bar his wife's right of dower when made for that purpose, has been differently held by different courts. In Tennessee, if this was known to the purchaser when he bought the estate, it was held that the conveyance, as to her, was fraudulent and void. So in Vermont and North Carolina, if the land is conveyed by the husband to his heirs;[4] while in Connecticut it was held effectual, though made to the heir or to a grantee by the way of a gratuity.[5]

§ 423. **Release by Wife.** — So far as a release by her own act is concerned, the wife might, from an early period, bar her claim to dower by joining with her husband in the act of conveyance. The most usual way of doing this was by levying a fine or suffering a recovery.[6] These are abolished by the statute 3 & 4 Wm. IV. c. 74; and wives may now convey their estates by deeds executed in concurrence with their husbands, and acknowledged in the form required by that act.[7]

§ 424. **Wife's Deed.** — [In this country, from early days,

[1] Park, Dow. 239; 2 Crabb, Real Prop. 149. For an anomaly in the law of Pennsylvania, introduced by judicial legislation, see note at the end of § 489.

[2] Swaine *v.* Perine, 5 Johns. Ch. 482. Cf. Dockray *v.* Milliken, 76 Me. 517.

[3] Norwood *v.* Marrow, 4 Dev. & B. 442.

[4] Brewer *v.* Connell, 11 Humph. 500; McGee *v.* McGee, 4 Ired. 105; Thayer *v* Thayer, 14 Vt. 107; Jenny *v.* Jenny, 24 Vt. 324.

[5] Stewart *v.* Stewart, 5 Conn. 317.

[6] 4 Kent, Com. 51; 2 Bl. Com. 137.

[7] Wms. Real Prop. 189.

the same result has been effected by the wife joining with her husband in a deed which] must have certain requisites.[1] In the first place, the wife must have been of age when executing it.[2] [But the statutes vary as to what is the age of competency. While it is everywhere provided that the joint deed of husband and wife will bar, the statutes vary as to whether the sole deed of the wife will have that effect.[3] In no case could her sole deed executed prior to her husband's conveyance be effectual.] The above propositions are not intended to apply to those States where special powers are conferred by statute upon married women as to making deeds, if thereby the rules of the common law in this respect have been changed. And where, the husband having conveyed lands in his lifetime, his widow after his death released all her right in the estate to the heirs of his grantee, it was held to bar her right of dower, though the consideration was only nominal.[4]

§ 425. **Requisites of Sufficient Deed.** — It is not sufficient, in most of the States, that the wife sign the deed with her husband, unless the same contains words of grant or release, which she adopts or which specially apply to her interest in the estate.[5] Her deed in such cases does not operate by the way of grant of any title, but by the way of estoppel. So that words of release on her part would be as effectual as any words of grant.[6] But a release of dower to a stranger cannot be set up as a bar to her claim against the tenant of the estate. Nor would it make any difference, in this respect,

[1] Fowler *v.* Shearer, 7 Mass. 14; 1 Bland, 229; Burge *v.* Smith, 27 N. H. 332; Kirk *v.* Dean, 2 Binn. 341; Powell *v.* Monson, 3 Mason, 347.

[2] Jones *v.* Todd, 2 J. J. Marsh. 359; Oldham *v.* Sale, 1 B. Mon. 76; Thomas *v.* Gammel, 6 Leigh, 9; Cunningham *v.* Knight, 1 Barb. 399; Priest *v.* Cummings, 16 Wend. 617; s. c. 20 Wend. 338; Markham *v.* Merrett, 8 Miss. 437; Hughes *v.* Watson, 10 Ohio, 127; Cason *v.* Hubbard, 38 Miss. 35.

[3] See statutes at the end of § 489.

[4] Thatcher *v.* Howland, 2 Met. 41.

[5] Leavitt *v.* Lamprey, 13 Pick. 383; Catlin *v.* Ware, 9 Mass. 218; Stevens *v.* Owen, 25 Me. 94; Lufkin *v.* Curtis, 13 Mass. 223; Powell *v.* Monson, 3 Mason, 347; Hall *v.* Savage, 4 Mason, 273; Westfall *v.* Lee, 7 Iowa, 12; Lothrop *v.* Foster, 51 Me. 367; McFarland *v.* Febiger, 7 Ohio, 194; s. c. 28 Am. Dec. 632. See *post*, § 2100 *et seq.*

[6] Frost *v.* Deering, 21 Me. 156; Stearns *v.* Swift, 8 Pick. 532; Learned *v.* Cutler, 18 Pick. 9; Davis *v.* Jenkins, 93 Ky. 353; s. c. 40 Am. St. Rep. 197; s. c. 20 S. W. Rep. 283.

that the release was made to one through whom the tenant claims, if the releasee had before that ceased to have any interest in the estate.[1] But though the interest of a wife as a dowress is not the subject of grant, so long as it is inchoate, it may be released to the owner of the fee. In Illinois, she may release it by joining with her husband in a deed; and where the owner of land which was subject to a wife's right of dower conveyed the same with covenant of warranty, and then the husband and wife released her right of dower in the premises to the vendor and covenantor of the tenant, it was held that there was so much of privity of estate between the covenantor and the owner of the fee, that her release to him enured to the benefit of his grantee and covenantee to bar her claim of dower.[2] The usual mode of barring herself by deed is by a clause of simple release, as "in token of relinquishing her right of dower in the granted premises," or the like. But words of grant may be equally effective, although no reference is made to her right of dower, *eo nomine*.[3] [It is generally held that the wife's name must be contained in the body of the deed either as releasor or as one of the grantors. It is not enough for her to sign and seal the deed.[4]] If she join in a deed which is executed by the attorney of her husband, it will be as effectual as if signed by the husband himself.[5] [But it is not necessary that husband and wife execute the deed at the same time.[6] It is generally held that she cannot act, to bar her dower through an attorney in fact, without express statutory permission.[7]]

[1] Pixley *v.* Bennett, 11 Mass. 298; Harriman *v.* Gray, 49 Me. 537.

[2] Robins *v.* Kinsie, 45 Ill. 354.

[3] Learned *v.* Cutler, 18 Pick. 9; Edwards *v.* Sullivan, 20 Iowa, 502; Smith *v.* Handy, 16 Ohio, 191.

[4] Catlin *v.* Ware, 9 Mass. 218; s. c. 6 Am. Dec. 56; Cox *v.* Wells, 7 Blackf. 410; Prather *v.* McDowell, 8 Bush, 46. *Contra*, Dundas *v.* Hitchcock, 12 How. 256. In New Hampshire, by immemorial usage it is sufficient for the wife to sign and seal the deed with her husband. Burge *v.* Smith, 27 N. H. 332. In Illinois, by statute it is enough for her to sign the deed, if she make the statutory acknowledgment. Johnson *v.* Montgomery, 51 Ill. 185.

[5] Glenn *v.* Bank of United States, 8 Ohio, 72; Fowler *v.* Shearer, 7 Mass. 14.

[6] Frost *v.* Deering, 21 Me. 156.

[7] Lewis *v.* Coxe, 5 Harringt. 401; Dawson *v.* Shirley, 6 Blackf. 531. See also Earle *v.* Earle, 1 Spencer, 347; Wrongkow *v.* Oakley, 64 Hun, 217; s. c. 19 N. Y. Supp. 51; Sumner *v.* Conant, 10 Vt. 9.

§ 426. **Wife's Release void if Husband's Deed ineffectual.** — [But the instrument in which she joins must be operative as a conveyance. If it is void for want of a seal,[1] or for the insanity of her husband in ward;[2] or is set aside as in fraud of creditors;[3] there is no estate in the grantee upon which the relinquishment of dower can operate. The wife is not barred except as against those who claim under a deed as a valid one. A stranger who does not claim under it cannot avail himself of her having executed it. And the reason for this is that the deed of the wife can operate only by way of estoppel. It conveys no interest or estate in lands.[4] Upon the same principle,] the grantee of the husband under a deed, in which the wife joined, sued the husband upon his covenant of seisin, and recovered in the action, it was held he could no longer avail himself of the deed as a bar to the wife's claim to dower out of the same premises. He had avoided the deed by such judgment.[5] And where the widow, administratrix, in order to settle a claim against her husband's estate, surrendered her claim of dower, and the settlement was set aside, she was remitted to her right of dower.[6]

§ 427. **Cannot be released by Parol.** — [Dower, whether inchoate or consummate, is such an interest in land as cannot be released or conveyed by parol.[7]

§ 428. **Release subsequent to Husband's Deed.** — So necessary is it for the wife to join in the husband's deed, that no subsequent separate release by her will bar her dower,[8] unless the stat-

[1] Manning *v.* Laboree, 33 Me. 343. So where the deed remains undelivered at the husband's death. Dunklee *v.* Butler, 56 N. Y. S. 491; 38 App. Div. 99.

[2] Rannells *v.* Gerner, 80 Mo. 474.

[3] Robinson *v.* Bates, 3 Met. 40; Malloney *v.* Horan, 49 N. Y. 111; Dugan *v.* Massey, 6 Bush, 81; Blanton *v.* Taylor, Gil. (Va.) 209; Wyman *v.* Fox, 59 Me. 100; Stimson *v.* Sumner, 9 Mass. 143; Humes *v.* Scruggs, 64 Ala. 40; Richardson *v.* Wyman, 62 Me. 280; Hinchcliffe *v.* Shea, 103 N. Y. 153; s. c. 8 N. E. Rep. 477; Summers *v.* Babb, 13 Ill. 483; Ridgway *v.* Masting, 23 Ohio St. 294; Bohannon *v.* Combs, 97 Mo. 446; s. c. 11 S. W. Rep. 232; Belford *v.* Crane, 16 N. J. Eq. 265.

[4] Green *v.* Putnam, 1 Barb. 500; Moore *v.* The Mayor, 8 N. Y. 110.

[5] Stinson *v.* Sumner, 9 Mass. 143.

[6] Pinson *v.* Williams, 23 Miss. 64.

[7] Keeler *v.* Tatnell, 23 N. J. L. 62; Davis *v.* Davis, 61 Me. 395.

[8] Shaw *v.* Russ, 14 Me. 432; Powell *v.* Monson Mfg. Co., 3 Mason, 347; Page *v.* Page, 6 Cush. 196.

ute permit it. Even her separate release written on the back of her husband's deed would have no effect.[1] But the joint release of husband and wife subsequent to his conveyance would be effectual.[2]]

§ 429. **Rule for construing Release.** — [Ordinarily, the release will be confined to its strict legal effect. Thus, where the wife released to one of two tenants in common,] it was held that the other tenant in common could not avail himself of it as a bar to her claim against him.[3] And the acknowledging of a deed not executed by her will not bar her claim.[4] In one case a wife joined with her husband in formally executing a deed, in which there was a blank left to be filled by a description of the premises granted. Her husband inserted altogether a different parcel than was intended when she signed it, and delivered it. It was held that she was not thereby barred of her dower in the premises described in the deed. In other words, it was not a deed by which she was bound.[5] So where the deed of indenture describes the wife as a party, and recites that the instrument witnesseth that the husband thereby conveys, etc., while he alone in terms conveys and covenants, it was held not to bar her, although she joined in its execution and in acknowledging it.[6]

§ 430. **Release must be voluntary.** — [The release must be the voluntary act of the wife, therefore a court of equity has no jurisdiction to interfere to deprive her of her right of dower, although she be confined as insane.[7] Nor can the court compel her to release in performance of any contract of her husband or promise on her part.[8]

§ 431. **Acknowledgment of Deed.** — In many States the wife's release of dower only becomes binding upon her making an acknowledgment of the execution of the deed before a com-

[1] French *v.* Peters, 33 Me. 396.

[2] Page *v.* Page, 6 Cush. 196; Robbins *v.* Kinzie, 45 Ill. 354.

[3] White *v.* White, 1 Harris. (N. J.) 202.

[4] Witter *v.* Biscoe, 13 Ark. 422.

[5] Conover *v.* Porter, 14 Ohio St. 450, 455; *post*, § 2100 *et seq.*; Burns *v.* Lynde, 6 Allen, 305.

[6] M'Farland *v.* Febiger, 7 Ohio, 194. See *ante*, § 425.

[7] *Ex parte* McElwain, 29 Ill. 442.

[8] Wiswall *v.* Hall, 3 Paige, 314; Richmond *v.* Robinson, 12 Mich. 193.

petent officer substantially in the terms of the statute. The acknowledgment is a part of the deed, which is, as to her, void without it.[1]] Where the law requires a certificate of the officer taking the acknowledgment, parol evidence of the fact will not be admitted to supply this.[2]

§ 432. **Dower barred by Foreclosure.** — From the familiar knowledge of the effect of a foreclosure of a mortgage upon the rights of the parties to the same, it is hardly necessary to add, that if a mortgage given by the husband before marriage, or by husband and wife during coverture, is foreclosed, all right of dower on the part of the wife is thereby barred at law.[3] But where the wife is held to have the right of dower in the equity of redemption, she must be made a party defendant, or she will not be bound by the decree — she will still have the right to redeem,[4] even in the lifetime of her husband.[5] A different rule prevails in some of the States by force of statute.[6] Such

[1] Danglarde *v.* Elias, 80 Cal. 65 ; s. c. 22 Pac. Rep. 69 ; Hart *v.* Sanderson, 18 Fla. 103 ; Hollingsworth *v.* Flint, 101 U. S. 591 ; Cahall *v.* C. M. Bldg. Asso., 61 Ala. 232; Jarrell *v.* French, 43 W. Va. 456 ; s. c. 27 S. E. Rep. 263. Recent statutes have done away with the necessity for a separate acknowledgment in so many States that no statement can be made here of what the requirement is in any given State. The foregoing cases, however (some of which involve conveyances of a married woman's separate property), illustrate the necessity for, and the nature, terms, and effect of, an acknowledgment by a married woman, in those States where it is required to bar dower. See the note on statutory provisions at the end of § 489. Unless the statute requires it, the certificate need not state the purpose for which the wife executed the deed. Hart *v.* Sanderson, *supra*. Husband and wife need not acknowledge jointly. Newell *v.* Anderson, 7 Ohio St. 12; Ludlow *v.* O'Neil, 29 Ohio St. 181 ; Ford *v.* Gregory, 10 B. Mon. 175.

[2] Elwood *v.* Klock, 13 Barb. 50.

[3] Nottingham *v.* Calvert, 1 Ind. 527 ; Farwell *v.* Cotting, 8 Allen, 211; Pitts *v.* Aldrich, 11 Allen, 39.

[4] Wheeler *v.* Morris, 2 Bosw. 524 ; Bell *v.* The Mayor, 10 Paige, 49 ; Lewis *v.* Smith, 9 N. Y. 502; Mills *v.* Van Voorhis, 23 Barb. 125, 134, 136; Smith *v.* Gardner, 42 Barb. 356 ; Leonard *v.* Villars, 23 Ill. 377 ; Johns *v.* Reardon, 3 Md. Ch. 57 ; Haldane *v.* Sweet, 55 Mich. 196 ; s. c. 20 N. W. Rep. 902 ; Denniston *v.* Potts, 11 Smedes & M. 36 ; Parmenter *v.* Binkley, 28 Ohio St. 32 ; Foster *v.* Hickox, 38 Wis. 408 ; Jones on Mort. 1067. There seems to be an exception to this rule if the mortgage which is foreclosed is given for the purchase-money. The wife would be bound by it, though done in mortgagor's lifetime, without making her a party. Bracket *v.* Baum, 50 N. Y. 8.

[5] And upon redemption she becomes equitable assignee of the mortgage. Davis *v.* Wetherell, 13 Allen, 60; Lamb *v.* Montague, 112 Mass. 352.

[6] See *post*, § 1176 ; Davis *v.* Wetherell, 13 Allen, 60, 62 ; Etheridge *v.* Vernoy, 71 N. C. 184. Subsequent cases in North Carolina hold that the wife, having

would be the effect of the vendor's enforcing his lien for the purchase-money, or of the enforcement of a judgment lien outstanding at the time of the marriage.[1]

§ 433. **Wife cannot release to Husband.** — But there is no way in which a *feme covert* at common law can bar her right of dower by any release made to her husband.[2] Even a contract made between herself, her husband, and her trustee, releasing her claim of dower, would not, if made during coverture, have that effect.[3] A contract to forbear to claim dower is not a release of it, nor will a covenant entered into before marriage, not to claim dower, operate as a release of her claim.[4]

§ 434. **Estoppel, when operative to bar Dower.** — It has often been held that a widow has barred herself from claiming dower by acts during coverture which have operated in the way of estoppel. But these acts, in order to have that effect upon the rights of a married woman, must constructively amount to one of the modes known to the law as constituting such bar, since her right of dower is not derived from, nor is it dependent on, any contract; nor would she be barred by any acts or declarations upon which others may have been induced to act, although in a matter of contract under similar circumstances she might not be admitted to aver against the truth of her acts or declarations, when by so doing it would work fraud and injustice.[5] In one case the husband mortgaged his estate without the wife joining in the deed. He then conveyed the equity of redemption by deed, in which his wife joined. Subsequently the grantee in the last deed reconveyed to the husband, and it

joined in the mortgage, is a necessary party to foreclosure proceedings, but not for the purpose of barring dower. Nimrock *v.* Scanlin, 87 N. C. 119. In South Carolina, a wife has no right of dower in an equity of redemption, although she has in the surplus after foreclosure. She has no "equity to redeem" and is barred by a decree to which she was not a party foreclosing a mortgage executed by her husband before marriage. Verree *v.* Verree, 2 Brev. 211.

[1] Bisland *v.* Hewett, 11 Sm. & M. 164; Wilson *v.* Davisson, 2 Rob. (Va.) 384; Robbins *v.* Robbins, 8 Blackf. 174; Ingram *v.* Morris, 4 Harringt. 111; Williams *v.* Woods, 1 Humph. 408.

[2] Carson *v.* Murray, 3 Paige, 483; Rowe *v.* Hamilton, 3 Me. 63; Martin *v.* Martin, 22 Ala. 104.

[3] Townsend *v.* Townsend, 2 Sandf. 711.

[4] Croade *v.* Ingraham, 13 Pick. 33; Hastings *v.* Dickinson, 7 Mass. 153; Gibson *v.* Gibson, 15 Mass. 106; Vance *v.* Vance, 21 Me. 364.

[5] Martin *v.* Martin, 22 Ala. 86, 104.

was held that she could only claim dower in the equity, since by joining with her husband in the deed of the equity, she had released and extinguished all right to the estate as it originally existed.[1]

§ 435. **Estoppel in Pais.** — But a widow may estop herself from claiming dower by acts *in pais*. Thus where a widow was entitled to dower out of an equitable estate of her husband, which was sold by his administrator by order of court, at which sale she was present and stated that the estate was free from any claim of dower; it was held that she was thereby estopped from claiming it against the purchaser, who had bought the premises relying upon her statement, although it was merely by parol.[2] In one case the court left it uncertain whether by her merely standing by at such a sale, and not making known her claim, she would be estopped to urge it.[3] But the cases hereafter referred to do not recognize so strict a rule of duty on her part. There must be some unequivocal act or declaration on her part which would either render a claim of dower on her part clearly unjust, or subject her to damages equal to its value if claimed, where the court, to avoid circuity of action, would refuse to claim. Thus where the widow, as administratrix of her husband's estate, sold lands under license of court, and orally declared they were free of dower, and the purchaser went on and made improvements upon them, she was held to be estopped.[4] But where she was present at the public sale of the husband's estate and made no objection or declaration, she was held not to be estopped.[5] Nor even where as administratrix she sold the estate for the payment of her husband's debts, but said nothing upon the subject of dower.[6] But if she had induced the purchaser to act upon the belief that she had no claim of dower, she might, perhaps, be estopped from claiming it.[7] On the other hand, where she sold her hus-

[1] Hoogland *v.* Watt, 2 Sandf. Ch. 148.

[2] Smiley *v.* Wright, 2 Ohio, 506; Connolly *v.* Branstler, 3 Bush, 702; Hart *v.* Giles, 67 Mo. 175.

[3] Heth *v.* Cocke, 1 Rand. 344.

[4] Dougrey *v.* Topping, 4 Paige, 94.

[5] Smith *v.* Paysenger, 2 (2 Mill) Const. R. (S. C.) 59.

[6] Sip *v.* Lawback, 2 Harris. 442. *Contra*, Wiseman *v.* Macy, 20 Ind. 239.

[7] Wright *v.* DeGroff, 14 Mich. 164, 167.

band's estate under a defective power and received the purchase-money, she was not allowed to claim dower out of the estate sold.[1] So where the heirs sold the inheritance by an arrangement with the widow that she should receive her share of the purchase-money, which was accordingly paid to her, and she gave a receipt for the same, but signed no deed of release, it was held that she was estopped from claiming her dower.[2]

§ 436. **Widow estopped by her Ancestor's Covenants.** — A widow may be estopped or rebutted from claiming dower by the covenants of her ancestor from whom she has received assets. Thus, the land of A. was sold on execution, and bought by B., who conveyed it with covenants of warranty. A.'s wife was heir at law to B., and on his death received assets by descent. A. and B. having both died, she sued for dower as widow of A. But the court held that she could not claim it against the covenants of B., since what she recovered as dower she would have to respond for as heir.[3]

[1] Reed *v.* Morrison, 12 S. & R. 18.

[2] Simpson's Appeal, 8 Penn. St. 199; Ellis *v.* Diddy, 1 Smith (Ind.), 354; s. c. 1 Ind. 561; and see Jones *v.* Powell, 6 Johns. Ch. 194. But where the widow as administratrix in connection with a co-administrator, in order to carry out a contract of sale entered into by the husband, conveyed, under decree of court, all the estate of her husband and all her own, after his death, and signed their names to the deed, it was held not to pass or affect her right of dower. Shurtz *v.* Thomas, 8 Penn. St. 359. See Aikman *v.* Harsell, 98 N. Y. 186. And where commissioners made under an order of court passed upon the application of a widow, sold land of the husband, but nothing was said of dower in her application, she was held not to be estopped from claiming it; nor would she be, though present at the sale, and making no claim of dower. Owen *v.* Slatter, 26 Ala. 547; Tennant *v.* Stoney, 1 Rich. Eq. 222. But see Storey *v.* Charleston Bank, 1 Rich. Eq. 275. But where, as administratrix, she sold her husband's land by order of court, and in her deed covenanted to warrant the title, to avoid circuity of action, she was held to have thereby barred herself of dower. Magee *v.* Mellon, 23 Miss. 585. So where the estate of which the husband died seised was sold by direction of the court of equity free from dower for the payment of his debts, and the wife took part in the proceedings, it was held to bar her dower. Gardiner *v.* Miles, 5 Gill, 94. And where the widow, as administratrix, sold her husband's estate and then married the purchaser, and he sold the estate by a warranty deed, in which she joined, relinquishing her right of dower in the premises, it was held that she was barred as to his rights under either husband. Usher *v.* Richardson, 29 Me. 415. In another case the mortgagee brought a bill to foreclose the mortgage, and made the widow, as administratrix of the husband, a party to the suit, but said nothing of her right as dowress. The estate was sold under a decree of the court, but it was held that she was not thereby barred of her dower therein. Lewis *v.* Smith, 11 Barb. 152.

[3] Torrey *v.* Minor, 1 Sm. & M. Ch. 489. See Bates *v.* Norcross, 14 Pick. 224;

§ 437. **Defeated by Paramount Title.** — If the seisin of the husband be defeated by a paramount title and right of seisin which has its origin prior to that of the husband, it defeats with it the right of dower in the wife or widow. Thus, if the seisin of the husband is wrongful, as that of a disseisor, and the rightful owner regain his seisin after the husband's death, the dower of the widow will be defeated.[1]

§ 438. **Defeated by Execution levied.** — So where the husband's land at the time of his marriage was under attachment, or subject to a judgment lien, and was levied upon during coverture, it was held that his seisin was thereby defeated at a period anterior to the marriage, and the widow's right of dower thereby destroyed.[2] But her claim to her dower is generally held paramount to a builder's lien upon land of the husband, for labor or materials furnished during coverture.[3]

§ 439. **Defeated by Sale for Husband's Ancestor's Debts.** — So if lands which have descended to an heir are sold for payment of the ancestor's debt, or by an executor, under a power in the will of the testator, the seisin of the heir or devisee, although completed by entry, will thereby be divested, and the right of dower in his wife defeated.[4]

§ 440. **Defeated by Entry for Condition Broken.** — The same effect would follow if the husband is evicted during coverture by title paramount, or if, his estate being one upon condition, the grantor or donor enters for a breach of the condition, and regains his original seisin.[5]

Russ *v.* Perry, 49 N. H. 547. But in Massachusetts not unless the assets were strictly such within the State. Julian *v.* B. C. F., etc. R. R., 128 Mass. 555.

[1] Tud. Cas. 44; 2 Crabb, Real Prop. 165.

[2] Brown *v.* Williams, 31 Me. 403; Sanford *v.* McLean, 3 Paige, 117. And where the levy was subsequent to the husband's death, it would defeat the dower assigned already to his widow. Whitehead *v.* Cummins, 2 Ind. 58.

[3] *Ante*, § 378. So Mark *v.* Murphy, 76 Ind. 534.

[4] Greene *v.* Greene, 1 Ohio, 249; Weir *v.* Tate, 4 Ired. Eq. 264; Mitchell *v.* Mitchell, 8 Penn. St. 126.

[5] 2 Crabb, Real Prop. 166, 324; Northcut *v.* Whipp, 12 B. Mon. 72; Com. Dig. "Dower," A. 5; Perkins, §§ 311, 312; Beardslee *v.* Beardslee, 5 Barb. 324. In this case the tenant for life leased to the remainder-man in fee, for the term of the life of the lessor. Ordinarily, the union of the particular estate with the inheritance in remainder or reversion would operate to give the wife of the remainder-man dower by way of merger or surrender. But in this case the lease was upon condition that the rent should be paid, which the lessee having failed to perform, the lessor

§ 441. **Determination of Base Fee.** — So where the husband is seised of a base or a determinable fee, and the same is determined by the happening of the event upon which it is limited, the right of dower on the part of his wife or widow thereupon ceases.[1]

§ 442. **Executing a Power of Appointment.** — Upon this principle, the case of Ray *v.* Pung was decided.[2] Lands were conveyed to A. B. and his heirs in trust for such uses as C. D. should by deed appoint, and in the meantime and in default of such appointment, to C. D. in fee. C. D. then had a wife, and afterwards by deed appointed the estate to another in fee, and it was held that his wife thereby lost her right of dower.[3] But if such deed of appointment had not been executed, his wife might have claimed her dower in the estate. Thus, where A., for a consideration paid by B., conveyed lands to a trustee in trust to the use of B. and his heirs, they to possess the same, and in trust to convey the same to such person as B. should by will or in writing appoint, and B. died without having made any such appointment, it was held that the wife might have dower, on the ground that, under the statute of uses, B took a qualified or determinable fee, but one which had not been determined.[4]

§ 443. **Principle of Dos de Dote.** — Out of the doctrine that a widow's right of dower may be defeated by avoiding the seisin upon which it depends, grows the familiar maxim, *Dos de dote peti non debet*, which is American as well as English law.[5] The application of this doctrine may be illustrated in this way. Upon the death of the owner of the land in fee, it passes at once by descent or devise to his heir or devisee, and carries with it such a seisin as gives the wife of such heir or devisee a right of dower in the premises. The ancestor or devisor may have left a widow who is entitled to dower out of the land, but until she

entered and defeated his seisin and estate, and with it the right of dower in his wife.

[1] 2 Crabb, Real Prop. 166 ; Seymour's Case, 10 Rep. 96 ; Com. Dig. "Dower," A 5.

[2] Ray *v.* Pung, 5 B. & A. 561.

[3] 4 Kent, Com. 51 ; 1 Atk. Conv. 277.

[4] Peay *v.* Peay, 2 Rich. Eq. 409. And see Link *v.* Edmondson, 19 Mo. 487.

[5] 4 Dane, Abr. 671.

has it set out the existence of such a right does not affect that of the wife of the heir or devisee, and if he dies she may claim dower out of the whole estate.[1] As will be more fully shown hereafter, the estate of a dowress, as soon as her estate is set out to her, is considered as a continuation of the husband's estate, resting upon his seisin, there being, in contemplation of law, no interval of time or estate between that of the husband and the dower estate of his wife. If, therefore, the widow of the ancestor or devisor sees fit at any time to enforce her right and to have her dower assigned, it at once relates back and cuts off the seisin of the heir or devisee as to so much of the estate, and converts his interest into that of a reversion expectant upon her death, and with it destroys the estate in possession which he may have enjoyed in the interim, as if it had never existed. If, then, he were to die in the life of the last-named dowress, his widow could not claim dower for want of a sufficient seisin on his part during coverture.[2] If, before the widow of the ancestor should have her dower assigned, the heir were to die and his widow should have her dower assigned to her, and then the first-mentioned widow were to have hers assigned in the same land, it would defeat the first assignment. Nor could the wife of the heir, if he dies leaving the widow of his ancestor, have dower in the lands set out to her, after the death of the latter, because her husband, by construction of law, never had anything in them but a reversionary interest.[3] But if the heir in the case above supposed had purchased the estate of his ancestor in his lifetime and married, and the ancestor's widow after his death should have her dower assigned in the granted premises, it would not have the effect to defeat the seisin acquired by the deed, but would only be an interruption of that seisin during the life of the elder dowress.[4] Or if before dower had been set off to the elder dowress, the purchaser had died, and

[1] Elwood *v.* Klock, 13 Barb. 50; 1 Cruise, Dig. 164; Hitchens *v.* Hitchens, 2 Vern. 405; Geer *v.* Hamblin, 1 Me. 54; Robinson *v.* Miller, 2 B. Mon. 288.

[2] Co. Lit. 31 *a*; Park, Dow. 155; Geer *v.* Hamblin, 1 Me. 54; Dunham *v.* Osborn, 1 Paige, 634; Cook *v.* Hammond, 4 Mason, 485; Reitzel *v.* Eckard, 65 N. C. 673; Durando *v.* Durando, 23 N. Y. 331.

[3] Reynolds *v.* Reynolds, 5 Paige, 161; Safford *v.* Safford, 7 Paige, 259; 4 Kent, Com. (8th ed.) 65, n.; McLeery *v.* McLeery, 65 Me. 172; Reitzel *v.* Eckard, *supra;* Stahl *v.* Stahl, 114 Ill. 375; s. c. 2 N. E. Rep. 160.

[4] Stahl *v.* Stahl, *supra.*

his own widow had been endowed out of the same, the assignment of dower to the former would operate to interrupt the enjoyment of the latter of her dower during the life of the former, but no longer. Or if the purchaser had died during the life of the ancestor's widow, and after her dower had been assigned, the widow of the purchaser would be entitled to dower out of the remainder of the estate, together with dower out of the reversion of that part of the estate set to the ancestor's widow.[1] In the first of the cases above supposed, the doctrine *dos de dote* prevailing, the widow of the ancestor had her estate as a continuance of her husband's as if there had been no intermission between them. In the others the purchaser had acquired a seisin in the life of the ancestor, and hers could only go back to his death. A reported case will serve to illustrate this matter further. A husband died, leaving a wife and six children. One of these, a son, married and died in the life of his mother, and it was held that his widow could claim dower in only one sixth of two third parts of his father's estate.[2] But in the cases supposed above, if the widow of the ancestor or of the vendor had had her dower set out in the premises before the heir or purchaser had married, and he were to marry and die in her lifetime, his widow could not claim dower. The seisin which he had acquired before dower had been set out as supposed would not avail him, not having existed during their coverture, and as soon as it was set out his estate was converted into a reversion which could not give his own widow dower.[3]

§ 444. **Effect of Release of First Widow.** — The cases do not seem to be uniform upon the subject, how far the widow claiming under the elder title must have proceeded in having her dower assigned to her, to affect the right of the younger widow to have dower out of the entire estate. The question has been raised where the tenant has sought to bar the younger widow by interposing the right of the elder to dower. In one case T L conveyed lands to S L, who conveyed to the tenant. After

[1] 4 Dane, Abr. 663 ; 1 Roper, Hus. & Wife, 382 ; Park, Dow. 156 ; 1 Cruise, Dig. 164 ; Bastard's Case, 4 Rep. 122 ; Geer *v.* Hamblin, 1 Me. 54 ; Manning *v.* Laboree, 33 Me. 343 ; Dunham *v.* Osborn, 1 Paige, 634.

[2] In Matter of Cregier, 1 Barb. Ch. 598.

[3] Park, Dow. 156 ; Reynolds *v.* Reynolds, 5 Paige, 161.

T L's death, his widow sued for her dower, and obtained judgment, and then released to the tenant. Then the widow of S L, he having died, sued, claiming dower out of the whole estate. But it was held that she could only have it out of two thirds of the estate excluding the third of which the first was dowable.[1] But where the first of two widows, in the case supposed, released to the tenant her right before she had taken measures to have her dower assigned, it was held to be no bar to the second claiming dower out of the entire estate, since by the release of the first her right was simply extinguished, and no one could set it up against the claim of the second.[2]

§ 445. **When the Husband's Estate determines.** — To the extent already defined, it is not understood that there is any difficulty in determining how the right of dower is affected by the seisin upon which it depends being defeated, as in case of a base fee, or an estate upon condition, and the like. But there is a class of cases where what at first sight might seem to be an inconsistent doctrine is applied. Thus, in the familiar case of tenant in tail dying without issue, although the estate, as one of inheritance, is determined, and the remainder over upon such a contingency takes effect, yet, it having been an estate of inheritance in the tenant, his widow, if he dies, will be entitled to dower, it being by implication of law annexed to such an estate as an incidental part of it, a portion of the quantity of enjoyment designated by the terms of the limitation itself.[3] And the doctrine is broadly laid down by writers upon the subject, that wherever the husband is seised during coverture of such an estate as is in its nature subject to the attachment of dower, the right of dower will not be defeated by the determination of that estate by its regular and natural limitation, as in the case of tenant in tail dying without issue, or tenant in fee dying without heirs, whereby the estate escheats.[4]

§ 446. **Same — Estates on Conditional Limitation.** — It should be borne in mind that the distinction between estates upon condition which have already been spoken of, and conditional lim-

[1] Leavitt *v.* Lamprey, 13 Pick. 382.

[2] Elwood *v.* Klock, 13 Barb. 50. See also Atwood *v.* Atwood, 22 Pick. 283.

[3] 2 Crabb, Real Prop. 165 ; 4 Kent, Com. 49 ; Park, Dow. 82, 157.

[4] Park, Dow. 147 ; Perkins, § 317 ; Tud. Cas. 44 ; Paine's Case, 8 Rep. 36 *a* ; 4 Kent, Com. 49 ; Northcut *v.* Whipp, 12 B. Mon. 65, 73 ; 1 Atk. Conv. 258.

itations, is that the former can only be defeated by the grantor or his heirs entering for condition broken, and defeating the estate; so that, notwithstanding the breach, the estate and those dependent upon it remain unaffected until such entry. In case of conditional limitations, however, the estate is so limited by the terms of the grant or devise creating it, that upon the happening of some condition, the estate *ipso facto* ceases, and passes at once over to some other person. Again, while by the common law a freehold cannot be created to commence in future unless by the way of reversion or remainder, nor can a reversion or remainder be created to take effect after the determination of a prior estate in fee-simple, yet by way of springing or shifting use by deed, or by way of executory devise by will, a fee-simple may be limited to take effect after a previous estate in fee-simple shall have been determined. To recur, then, to the right of dower in estates held by a conditional limitation, it is laid down by a writer of great authority, "that an immediate estate in fee, defeasible on the taking effect of an executory limitation, has all the incidents of an actual estate in fee-simple in possession, such as curtesy, dower, etc., the devisee having the inheritance in fee, subject only to a possibility." [1] And this case might be put for illustration. A devises lands to B in fee, but if he die without children living, then over to another. Though B die without children, his wife will nevertheless have dower.[2] The difficulty has been to distinguish upon what ground a widow may have her dower out of an estate which has been defeated by an executory limitation like the above, but would be barred if the estate of her husband were defeated by a condition at common law, or by being a base or determinable fee.[3]

[1] 1 Jarman, Wills, 792; 2 Crabb, Real Prop. 167.

[2] 2 Crabb, Real Prop. 167; Co. Lit. 241, n. 4; Kennedy *v.* Kennedy, 29 N. J. 185. See also *ante*, §§ 324, 325.

[3] Butler has a very elaborate note to Co. Lit. 241, in which he attempts to assist, as he calls it, "in clearing up the complex and abstruse points of learning in which this question is involved." Judge Kent says, "that the ablest writers upon property law are against the right of the dowress when the fee of the husband is determined by executory devise or shifting use." 4 Kent, Com. 50. See also Park, Dow. 178–186; Northcut *v.* Whipp, 12 B. Mon. 65. Atkinson states the law to be thus: "Where the husband's estate is defeated by title paramount, as by entry for condition broken, by reason of a defective title in the grantor, or by shifting

§ 447. **Barred by Jointure.** — The most common mode formerly in use of barring dower was by means of a jointure. But as this forms a species of estate of a peculiar character, it will be considered by itself. And in connection with it reference will be made to ante and post nuptial settlements, testamentary provisions, etc., as affecting rights of dower.

§ 448. **Presumption of Release by Lapse of Time.** — In some States there is a bar to the widow's recovering dower arising from lapse of time. But the law on this point is very far from being uniform, or, in some cases, even settled. That a long lapse of time after the husband's death before any claim made may be evidence proper to be submitted to a jury to establish a release of the right, would seem to be sustained by authority as well as the general principles of evidence, even though no positive rule of limitation existed.[1] So the receiving a separate maintenance for several years before the husband's death, under articles of separation, and continuing to receive it for eight years after, was held to create a presumption of release of dower on the part of the wife.[2]

§ 449. **Statute of Limitations.** — [At common law, there was no time bar to the recovery of dower. By statute 3 & 4 Wm. IV. c. 27, the limitation of the widow's right to claim dower is fixed at twenty years from her husband's death. In this country, the common law prevails in a few States,[3] and in others

use, the right to the dower is also defeated; but where the husband's estate is defeated by executory devise, it has been settled, rather anomalously, it has been thought, that the widow shall nevertheless be entitled to dower." 1 Atk. Conv. 258. Preston leaves the point as doubtful. 3 Prest. Abs. 373. Burton says: "Where the wife or husband has an estate in fee subject to be divested by a shifting use or executory devise, it has been a disputed question whether these rights may not be enforced after the event, and notwithstanding the divesting and destruction of the estate upon which they attached." Burton, Real Prop. § 355. One of the leading cases upon this subject is Buckworth *v.* Thirkell, 3 B. & P. 652, n., which is said by Judge Kent to be opposed to the opinion of the ablest writers on property law (4 Kent, Com. 50. See also Park, Dow. 178; Evans *v.* Evans, 9 Penn. St. 190); while C. J. Best says that, though questioned, it has become the settled law, and cites in that connection Lit. § 53; Moody *v.* King, 2 Bing. 447. So Hatfield *v.* Sneden, 54 N. Y. 285, overruling s. c. 42 Barb. 615, and Weller *v.* Weller, 28 Barb. 588.

[1] Barnard *v.* Edwards, 4 N. H. 321.

[2] Evans *v.* Evans, 3 Yeates, 507.

[3] 1 Swift's Dig. 256; Spencer *v.* Weston, 1 Dev. & B. 213; Simonton *v.* Houston, 78 N. C. 408; Chew *v.* Farmers' Bk., 2 Md. Ch. Dec. 231.

various time limits have been imposed. These statutes have been incorporated as far as possible in the note at the end of § 489.] And so far as the statute of limitations grows out of the supposed right to presume a title from long adverse enjoyment by the person in possession, it could not well apply to the case of dower, since, upon the death of the husband the wife is not seised, nor has she a right of entry. So that whoever is in possession is not to be regarded as holding adversely to her, and her non-claim is a mere forbearance to place herself in a condition in which she can convert a mere personal *chose in action* into an estate.

§ 450. **Statutory Provisions for barring Dower.** — Much of the law as to barring a widow's right of dower has been practically superseded by statutes both in England and in several of the United States. The act of 3 & 4 Wm. IV. c. 105, called the Dower Act, covers all cases of marriage since Jan. 1, 1834. By that act the dower of married women has been placed completely within the power of their husbands. A husband may exclude his wife from such claim by inserting a clause of such exclusion in the deed which he takes, or by a deed executed by himself in his lifetime, or by his will, after his death. And even if no such disposition is made of the husband's lands, they are charged with the payment of his debts, to the exclusion, if need be, of the widow's dower. The effect has been that dower no longer exists in practice, except as against the husband's heirs at law, and even to that extent it is inoperative if the husband, as is now commonly done, inserts a declaration in his title-deed denying such right. The only compensation provided in the act for this overthrow of the old system is, that dower may extend to lands to which the husband has a right though unaccompanied with a seisin, and to equitable estates of inheritance.[1]

§ 451. **Statutory Changes in the Right of Dower.** — From various causes growing out of the condition of a new country, in which wild lands rapidly become cultivated fields, and forests give place to marts of trade and commerce, the people of many of the States have seen fit to modify by statute the common law as to dower. In some the widow can only claim her dower out

[1] Wms. Real Prop. 194.

of lands of which her husband died seised. In some she is authorized to clear wild land and reduce it to culture, though to do so she must cut down the timber and firewood thereon. And in others there are other changes which can, at best, be but very briefly noticed. In several of the States the common law will be found substantially in operation, except, it may be, as to equitable estates, which have already been spoken of. Many of these changes have already been enumerated.

§ 452. **Barred by Eminent Domain.** — One mode in which dower may be defeated remains to be mentioned, and that is, by the exercise of eminent domain during the life of the husband, or, what is equivalent to it, the dedication of land to the public use. This grows out of the nature of a wife's interest in the lands. Where a corporation is authorized to take lands for a public use and hold the same in fee, paying the owner thereof an ascertained compensation, the wife's right of dower is effectually barred by the act of the legislature. The right of the wife during her husband's life, being merely inchoate, cannot be regarded in exercising eminent domain, and is, moreover, subject to any regulation which the legislature may see fit to make, though its effect be to divest the right; and the estate of the widow after the assignment of dower being a continuation of the estate of the husband, he, while living, is the only one who can represent it, and his compensation is in full for the part taken.[1] [The same is true where the husband conveys to a railway company for a public use, as for a right of way, by deed in which the wife does not join.[2]] So where the owners of land laid open a street in a city for the purpose, among other things, of erecting a market-house thereon by the city, which was done accordingly, it was held that land so taken, like land taken for highways, was not subject to the widow's dower in right of the original owners.[3] The principle involved in the above and similar cases is a pretty important one, nor has it been hitherto very well defined. It is difficult to see why it should not apply in all cases where the law authorizes the husband's land to be

[1] Moore *v.* The Mayor, 4 Sandf. 456; s. c. 8 N. Y. 110; French *v.* Lord, 69 Me. 537.

[2] Baker *v.* Atchison, etc. R. Co., 122 Mo. 396; s. c. 30 S. W. Rep. 301.

[3] Guynne *v.* Cincinnati, 3 Ohio, 24; Duncan *v.* Terre Haute, 85 Ind. 104.

taken *in invitum*, and compensation therefor made for the fee of the same; as, for instance, in those States where the mill-owner is authorized to flow lands which he does not own. But it would seem that in all such cases the widow has such an interest in the compensation as equity will protect.[1]

[1] Wheeler *v.* Kirtland, 27 N. J. Eq. 534.

CHAPTER XIV.

DOWER — ASSIGNMENT OF DOWER.

§ 453. Right accrues at death of husband.
454. Quarantine.
455. Parol assignment.
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478. Assignment *de novo*.
479. Widow's remedy in equity.
480. Contribution.
481. Contribution, how estimated.
482. Equity has no jurisdiction to commute dower.

§ 453. **Right accrues at Death of Husband.** — The widow is entitled to have dower set out to her immediately upon the death of her husband. But until it is assigned she has no right to claim any specific part of the estate, or enter upon or occupy any part of it.[1]

§ 454. **Quarantine.** — Out of tenderness, however, for her condition the Magna Charta provided for her the right to

[1] 2 Bl. Com. 139.

occupy the principal mansion-house of her husband, and to be supported therein out of his personal estate for the term of forty days from the time of his death, which was called her quarantine. She forfeited this, however, if she married again within that time.[1] This right, moreover, could not be exercised in respect to such estate as she is dowable of. If her husband, therefore, died possessed of a leasehold estate, she could not claim her quarantine out of it.[2] The right of quarantine in the widow is recognized in the statutes of the States, though somewhat various as to the extent and duration of its enjoyment by the widow.[3]

§ 455. **Parol Assignment.** — The right of a wife to dower having become fixed by the death of the husband, nothing remains in order to consummate it but to ascertain the particular part of his estate she is to enjoy by virtue of it. The moment this is done, a freehold vests in her by act of law, and not by way of conveyance from the heir or terre-tenant. Nor is any writing or livery of seisin required to complete the assignment. A parol assignment, if accepted by the widow, is as effectual as if done in ever so formal a manner.[4]

§ 456. **Assignment of Common Right.** — There are two modes of assigning dower, one "of common right," and one "against common right." The former is the one always to be adopted where the assignment is by legal process, and must be pursued by the tenant or heir if he undertakes to set out dower so as to satisfy her claim without any formal assent or acceptance on her part. The other may be resorted to and take almost any form, because it implies a special assent or agreement on her part to accept it instead of the more precise and formal manner.

§ 457. **By Metes and Bounds.** — Dower of common right must always be assigned by metes and bounds where the property is

[1] Tud. Cas. 51 ; Co. Lit. 34 *b*.

[2] Voelekner *v.* Hudson, 1 Sandf. 215.

[3] See note at the end of § 489.

[4] Meserve *v.* Meserve, 19 N. H. 240 ; Blood *v.* Blood, 23 Pick. 80 ; Shattuck *v.* Gragg, 23 Pick. 88 ; Conant *v.* Little, 1 Pick. 189 ; Johnson *v.* Neil, 4 Ala. 166 ; Jones *v.* Brewer, 1 Pick. 314 ; Baker *v.* Baker, 4 Me. 67 ; Boyers *v.* Newbanks, 2 Ind. 388 ; Tud. Cas. 51 ; Johnson *v.* Morse, 2 N. H. 48 ; Pinkham *v.* Gear, 3 N. H. 163.

of a character that it can be so set out.[1] And if the sheriff in assigning dower should adopt any other form, it would be erroneous.[2]

§ 458. **Assignment against Common Right.** — But where the parties agree on a different form, it may be effectual. Thus dower may be set out in common with the balance of the estate.[3] Or it may be a rent for life issuing out of the lands of which the widow is dowable; or it may be of a certain agreed number of acres.[4] But the dower assigned must be out of land of which she is dowable, unless it is done by the consent of the parties.[5] Such assignment may be by parol.[6]

§ 459. **Assignment against Common Right, when a Bar.** — If it is done in any form against common right it will not operate to bar her claim unless it be done by indenture to which she is a party, and by which she would be estopped from avoiding it.[7] Even the acceptance of a deed from the heir or tenant would not be sufficient if she do not execute a release.[8] One reason why an assignment of lands out of which the widow is not dowable is no bar to dower unless done and accepted by indenture, is, that her title to it must depend upon the grant of the person making the assignment, and unless this be by deed, she can only hold as tenant at will; and for the further reason, that a right or title to a freehold cannot be barred by any *collateral* satisfaction.[9] And the same rule applies to a rent granted in lieu of dower out of lands of which she is not dowable.[10] Where her dower has been thus assigned against common right, she will be bound by it, whether it turns out to be more or less valuable than what her appropriate dower would have been,

[1] Pierce *v.* Williams, 2 Penningt. 521.

[2] Booth *v.* Lambert, Style, 276; Co. Lit. 34 *b*, n. 213; 1 Rolle, Abr. 683; Pieree *v.* Williams, 3 N. J. L. 282 (2 Penn. 709).

[3] Rooth *v.* Lambert, Style, 276.

[4] Co. Lit. 34 *b*; Moore, 59; 1 Bright, Hus. & Wife, 375, 377, 378; Tud. Cas. 52.

[5] Perkins, § 407.

[6] Lenfers *v.* Henke, 73 Ill. 405.

[7] Co. Lit. 34 *b*; Perkins, § 410; 1 Bright. Hus. & Wife, 377; Tud. Cas. 52; Conant *v.* Little, 1 Pick. 189; Jones *v.* Brewer, id. 314.

[8] 1 Roper, Hus. & Wife, 410.

[9] 1 Roper, Hus. & Wife, 410; Vernon's Case, 4 Rep. 1.

[10] 1 Bright. Hus. & Wife, 377.

and she cannot insist upon a new assignment, though her title fails to that which she has accepted.[1]

§ 460. **Assignment must be absolute.** — Another essential requisite in assigning dower "of common right," in order to operate as a bar to a widow's action for recovery of dower, is that it should be done absolutely, and not be accompanied by any condition.[2] And where in the assignment the trees growing upon the premises were excepted, it was held that such exception was inconsistent and void.[3]

§ 461. **Must be a Freehold.** — In the next place, such assignment must be absolute for her life. Any less estate, whatever be its value, would not bar her suit to recover her legal dower.[4] And one reason for this is, that the estate of the widow in her dower lands is considered as a continuance of that of her husband, the heir or tenant being a mere minister of the law in marking out as to what particular land this shall apply. He cannot dictate or change the terms on which she is to hold it.[5]

§ 462. **By whom made.** — No one but the tenant of the freehold can set out dower where resort is not had to legal process. But it is not essential that the title of the tenant should be a valid one, provided he is in possession under a claim of title, and sets out the dower without fraud or covin.[6] If, therefore, it be so done by a disseisor, abator, or intruder, it cannot be avoided by the heir or disseisee, provided it be of such part only of the estate as the heir would have been bound to assign had he been in possession of the premises. Though, if it be of a rent instead of the land, the heir or disseisee would not be bound by it, because it is against common right, and is only good when made by some one competent to bind the estate by agreement.[7] It may be done by an infant, if heir to the estate of which the widow is dowable, subject, however, to be corrected and diminished by writ of admeasurement of dower in

[1] Jones *v.* Brewer, 1 Pick. 314; Co. Lit. 32 *b*.

[2] Co. Lit. 34 *b*, n. 217; 2 Crabb, Real Prop. 144; Tud. Cas. 52; Austin *v.* Austin, 50 Me. 74.

[3] Bullock *v.* Finch, 1 Rolle, Abr. 682; Tud. Cas. 52.

[4] 1 Bright, Hus. & Wife, 379; 2 Crabb, Real Prop. 144.

[5] 1 Bright, Hus. & Wife, 379.

[6] Co. Lit. 35 *a*.

[7] Perkins, § 394; Tud. Cas. 61; Co. Lit. 35 *a*; 1 Bright, Hus. & Wife, 365; Perkins, § 398.

favor of such infant, if, by mistake, he shall have set her out too much.[1] But this privilege is limited to infants, for if the heir be of age and sets out dower, which is accepted by the widow, both parties will be governed by it.[2] If the infant heir be under guardianship, the guardian may assign dower. And it seems that, if so done, it will bind the heir, although Blackstone and Fitzherbert state the law otherwise.[3] If the land be owned by two as joint tenants, either may set out the dower.[4] And if these joint tenants be husband and wife, she will be bound by the assignment of the husband.[5]

§ 463. **How recovered.** — If the heir or tenant fail to assign dower, the widow may resort to legal process. In Illinois a widow recovers her dower in an action of ejectment.[6] One mode is the common law action of dower, another is by proceedings in equity, and a third is one provided in most, if not all the States, by a cheap and summary process issuing from courts having cognizance of probate matters. In some cases these may be concurrent remedies. But, generally speaking, the last is more restricted than either of the others, and is confined to cases where the claim of the widow is upon the heir or devisee of the husband, and is not the proper one to resort to when it is necessary to determine a contested right of dower.[7] In New York, the effect of a decree of the surrogate is merely to fix the admeasurement and location of the wife's dower, but it does not establish the title. That must be tried in an action of ejectment, sued out to recover possession of the premises.[8] If, however, dower shall have been set out by one of these

[1] 2 Bl. Com. 136 ; Fitzh. N. B. 348 ; Jones *v.* Brewer, 1 Pick. 314 ; McCormick *v.* Taylor, 2 Ind. 336.

[2] Stoughton *v.* Leigh, 1 Taunt. 402 ; Tud. Cas. 52.

[3] Boyers *v.* Newbanks, 2 Ind. 388 ; Jones *v.* Brewer, 1 Pick. 314 ; Young *v.* Tarbell, 37 Me. 509 ; Curtis *v.* Hobart, 41 Me. 230 ; 2 Bl. Com. 136 ; Fitzh. N. B. 348. Under the Illinois statute, the act of the guardian in assigning dower is void. Heisen *v.* Heisen, 145 Ill. 658 ; s. c. 34 N. E. Rep. 597.

[4] Co. Lit. 35 *a*.

[5] 2 Crabb, Real Prop. 142.

[6] Owen *v.* Peacock, 38 Ill. 33.

[7] Sheaffe *v.* O'Neil, 9 Mass. 9 ; French *v.* Crosby, 23 Me. 276 ; Matter of Watkins, 9 Johns. 245 ; Holloman *v.* Holloman, 5 Sm. & M. 559 ; Ware *v.* Washington, 6 Sm. & M. 737 ; Bisland *v.* Hewett, 11 Sm. & M. 164 ; Thrasher *v.* Pinckard, 23 Ala. 616.

[8] Parks *v.* Hardey, 4 Bradf. 15.

courts, the assignment is conclusive upon the parties until the judgment shall be reversed.[1] And in Massachusetts, though the judge of probate has no right to assign dower out of a mortgaged estate,[2] yet if the mortgagor dies seised of land, dower may be set off to his widow by the judge, if neither the mortgagee nor heirs or devisees of the mortgagor object.[3] In respect to Vermont, the propositions above stated as to jurisdiction do not apply, because courts of probate there have exclusive jurisdiction in assigning dower.[4] In England and in several of the States, courts of equity and common law have concurrent jurisdiction in many cases respecting dower.[5]

§ 464. **Jurisdiction of Equity.** — In England this has been the case since the time of Elizabeth, and has become much the more usual mode of recovering dower.[6] But where there is this concurrent jurisdiction, the rules of law which they apply are alike in both courts.[7] This right of concurrent jurisdiction has been exercised in the courts of the United States in the cases above cited, and in New York, New Jersey, Maryland, Alabama, Virginia, North Carolina, and Illinois.[8] But in some cases, as in equitable estates for instance, it will be seen hereafter that courts of equity have exclusive jurisdiction. It will therefore be proper to consider the remedies at the common law by themselves.

§ 465. **Of making Demand.** — Dower should be set out to the widow within the time of her quarantine, and it is often said she many bring her action at law for its recovery if not set out within that time.[9] And as, at common law, no damages

[1] Jackson *v.* Hixon, 17 Johns. 123 ; Tilson *v.* Thompson, 10 Pick. 359.

[2] Raynham *v.* Wilmarth, 13 Met. 414.

[3] Henry's Case, 4 Cush. 257. And the subsequent transfer of the mortgage to the heir, who has so assented, will not entitle the latter to dispute the assignment. King *v.* King, 100 Mass. 224.

[4] Danforth *v.* Smith, 23 Vt. 247.

[5] 2 Crabb, Real Prop. 187 ; Herbert *v.* Wren, 7 Cranch, 370, 376.

[6] Perkins, § 317 ; 2 Crabb, Real Prop. 187.

[7] Potier *v.* Barclay, 15 Ala. 439 ; Mayburry *v.* Brien, 15 Pet. 21.

[8] Badgley *v.* Bruce, 4 Paige, 98; Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349 ; Wells *v.* Beall, 2 Gill & J. 468 ; Kiddall *v.* Trimble, 1 Md. Ch. Dec. 143 ; Blunt *v.* Gee, 5 Call, 481 ; Campbell *v.* Murphy, 2 Jones, Eq. 357 ; Blain *v.* Harrison, 11 Ill. 384 ; Osborne *v.* Horine, 17 Ill. 92.

[9] 2 Crabb, Real Prop. 140 ; 1 Bright, Hus. & Wife, 363 ; 4 Kent, Com. 63.

could be recovered in a real action, it does not seem to have been necessary to make a demand for dower before commencing the action.[1] But if no such demand is made, the tenant may plead *tout temps prist* in bar of any claim for damages.[2] And as by the statute of Merton damages are recoverable in an action of dower, a demand is, practically, uniformly made preliminary to the commencement of the action.[3]

§ 466. **Of making Demand, continued.** — In some of the States a demand *must* be made before commencing an action, and the time within which, after such demand is made, it may, and, if brought at all, must be commenced, is regulated by their local statutes. In Massachusetts it must be made of the person who is seised of the freehold, and the action may not be commenced until one month after such demand, and must be within one year.[4] And this demand is a personal one, and is required to be made upon every person who is tenant, though he be a tenant in common with others.[5] And it may be made by attorney.[6] But a demand for dower in one parcel of land which belongs to two persons in severalty, must be made upon each separately. A joint demand would not be good as to either.[7] The heir or tenant therefore has one month after such demand in which to assign the dower. And he may always protect himself against a suit, if after such demand he proceeds to set out dower to the widow fairly to the extent of her right, for by so doing he acquires a good and legal defence against any further claim.[8] In New York, no previous demand is required in order to give the widow her action, which in that State is in the form of ejectment, instead of the common law form.[9] Nor is

[1] Stearns, Real Act. 312.

[2] *Tout temps prist*, — "always ready." "A plea by which the defendant signifies that he has always been ready to perform that which is required of him. The object of the plea is to save costs." Bouvier's Law Dict.

[3] Stearns, Real Act. 313; Co. Lit. 32 *b*; Watson *v.* Watson, 10 C. B. 3; Hitchcock *v.* Harrington, 6 Johns. 290. See Roan *v.* Holmes, 32 Fla. 295; s. c. 13 So. Rep. 339.

[4] Pub. Stat. c. 174, § 2; unless such person is unknown to her or absent from the State.

[5] Burbank *v.* Day, 12 Met. 557.

[6] Stevens *v.* Reed, 37 N. H. 49.

[7] Pond *v.* Johnson, 9 Gray, 193.

[8] Baker *v.* Baker, 4 Me. 67.

[9] Jackson *v.* Churchill, 7 Cow. 287; Ellicott *v.* Mosier, 7 N. Y. 201; s. c. 11 Barb. 574.

it necessary to make demand of the heir where the husband died seised in order to maintain an action for dower in New Jersey; nor can *tout temps prist* be pleaded in the action.[1] It has been held to be sufficient to demand the dower of the minor and his guardian, where the heir who is to set it out is under age.[2] Although it is usual to demand dower in writing, it is not necessary to do so; it may be done by parol;[3] and the one making it may be appointed by parol.[4] So it may be demanded by an attorney; nor is it necessary that the power of such attorney should be in writing.[5] And in Watson *v.* Watson,[6] above cited, where the son of the demandant "asked him (the tenant) if he would pay his mother her thirds," to which he replied, "No," the demand was held good, no question having been raised as to the authority of the son to make such request. But if a power of attorney be given in writing, it must contain sufficient authority to make the requisite demand, or it will be of no avail. Therefore where the power authorized the agent to demand dower in the "aforesaid premises," but no premises have been mentioned, it was held so defective that no demand under it would lay the foundation for an action.[7] No great particularity is required in the description of the estate out of which the dower is demanded. It will be sufficient if it give notice to the tenant to what land it means to refer.[8] It is enough that the demand apprise the tenant, with reasonable certainty, of the claim made upon him.[9] The demand must be made of the tenant of the freehold, though it need not be made upon the land.[10] And a demand so made will be sufficient, though such tenant were afterwards to convey his lands before suit brought, and though the suit must in that case be against another person, who is the tenant of the freehold when the action is commenced.[11]

§ 467. **Action of Dower.** — If the widow shall have taken

[1] Hopper *v.* Hopper, 22 N. J. 715. [2] Young *v.* Tarbell, 37 Me. 509.
[3] Co. Lit. 32 *b*; Baker *v.* Baker, 4 Me. 67; Page *v.* Page, 6 Cush. 196.
[4] Lothrop *v.* Foster, 51 Me. 367. [5] Luce *v.* Stubbs, 35 Me. 92.
[6] Watson *v.* Watson, 10 C. B. 3. [7] Sloan *v.* Whitman, 5 Cush. 532.
[8] Haynes *v.* Powers, 22 N. H. 590; Atwood *v.* Atwood, 22 Pick. 283; Bear *v.* Snyder, 11 Wend. 592; Ayer *v.* Spring, 10 Mass. 80.
[9] Davis *v.* Walker, 42 N. H. 482. [10] Luce *v.* Stubbs, 35 Me. 92.
[11] Barker *v.* Blake, 36 Me. 433; Watson *v.* Watson, 70 Eng. Com. Law, 5, n.; Parker *v.* Murphy, 12 Mass. 485.

the proper preliminary measures without success, she is entitled to an action for the recovery of her dower, with damages for its detention, and a precept directed to the sheriff requiring him to cause her dower to be set off and possession delivered to her, and to enforce the payment of the damages which a jury shall have ascertained.[1] This is one of the three real actions which were retained in England under the repealing statute of 3 & 4 Wm. IV. c. 7, § 36, the other two being *quare impedit*[2] and ejectment. It is one of the two retained in Massachusetts, the other being a writ of entry upon disseisin.[3] There were formerly two forms of action of dower. But the form in use in this country answers most nearly to that known to the common law as "writ of dower *unde nihil habet*."[4] It must be brought in the county where the land lies, like all real actions,[5] and lies only against the tenant of the freehold at the time of commencing the action.[6] And this, as has been before stated, though he who was tenant of the freehold when the demand was made shall, in the meantime, have conveyed to another tenant.[7] Nor can the tenant, though a minor, have the ordinary privilege of an infant defendant in a real action, of having the "parol demur," that is, of having the action continued in court till he arrive at full age. And the obvious reason is, that the widow

[1] 2 Bl. Com. 136; 1 Bright, Hus. & Wife, 369; 1 Rolle, Abr. 683; Stearns, Real Act. 311-319.

[2] As this action is designed to try a disputed title to an advowson, or the right of presentation to a church, there is no action answering to it in the forms in use in the United States. Actions of dower and *quare impedit*, as special actions, are now done away with, and dower must be sued for by writ and summons as in any other action, by the common law. Procedure Act of 1860. Upon the writ is indorsed a notice that the plaintiff intends to declare in dower. Broom's Com. Law, 119.

[3] Pub. Stat. c. 173, § 1; c. 174, § 1. In the writ of entry, in Massachusetts, the demandant not only recovers damages covering mesne profits, but under a state of things provided for by statute, the tenant may claim compensation for betterments made by him while in possession of the demanded premises. Pub. Stat. c. 173, §§ 12, 17, 18; Haven *v.* Adams, 8 Allen, 368. But where he has made them without reason to suppose himself owner, he cannot claim such compensation. Daggett *v.* Tracy, 128 Mass. 167.

[4] 4 Kent, Com. 63; Stearns, Real Act. 302.

[5] Stearns, Real Act. 87.

[6] 1 Bright, Hus. & Wife, 398; Hurd *v.* Grant, 3 Wend. 340; Miller *v.* Beverly, 1 Hen. & M. 367; Ellicott *v.* Mosier, 11 Barb. 574.

[7] Barker *v.* Blake, 36 Me. 433.

is supposed to need the enjoyment of her dower for her immediate support.[1] In some States the plea of non-tenure may be pleaded in bar of such an action.[2] In others, it must, to avail, be pleaded in abatement.[3] But the suit may be against the tenant of the freehold, though he holds by wrong, such as a disseisor, abator, or intruder.[4] So if the owner of the estate shall have bargained it away, but the deed has not yet been delivered, he will be the party to be sued.[5] But in New York, the action being ejectment, it may be maintained against any tenant in possession, whether a freeholder or not.[6] The proper action of dower cannot be a joint one against the several tenants of separate parcels of estate, though originally derived from the husband, but each tenant must be sued separately in respect to the parcel of which he is tenant.[7] The action, moreover, is so personal in its nature on the part of the demandant, that if she dies during its pendency the suit abates.[8] In Atkins *v.* Yeomans, judgment for dower was rendered, and by agreement between the parties certain persons were to act as commissioners to set out the dower and assess the damages, to be reported to the court for adjudication, and the demandant died before they had made their return. The court declined to enter judgment for damages and costs, and they add: "The action died with the demandant, and the judgment for damages cannot now be rendered."[9]* It is no objection to the action that some per-

* Note. — By the statute of Maryland the action of dower survives. 1 Hilliard, Real Prop. 154.

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[1] Stearns, Real Act. 107; 1 Bright, Hus. & Wife, 364.

[2] Casporus *v.* Jones, 7 Penn. St. 120.

[3] Manning *v.* Laboree, 33 Me. 343.

[4] Norwood *v.* Morrow, 4 Dev. & B. 442; Otis *v.* Warren, 16 Mass. 53.

[5] Jones *v.* Patterson, 12 Penn. St. 149.

[6] Ellicott *v.* Mosier, 7 N. Y. 201; Ellis *v.* Ellis, 4 R. I. 110.

[7] Fosdick *v.* Gooding, 1 Me. 30; 1 Roper, Hus. & Wife, 437; Barney *v.* Frowner, 9 Ala. 901.

[8] Rowe *v.* Johnson, 19 Me. 146; Sandback *v.* Quigley, 8 Watts, 460; Atkins *v.* Yeomans, 6 Met. 438.

[9] Atkins *v.* Yeomans, 6 Met. 438. See also Rowe *v.* Johnson, 19 Me. 146; Turney *v.* Smith, 14 Ill. 242; Hildreth *v.* Thompson, 16 Mass. 191. It has been decided that equity would give an accounting to the personal representatives of a deceased widow for the rents of land in which she was entitled to dower, although she died before assignment. Pollitt *v.* Kerr, 49 N. J. Eq. 65; s. c. 22 Atl. Rep. 800. But see *contra*, Roan *v.* Holmes, 32 Fla. 295; s. c. 13 So. Rep. 339.

son other than the tenant holds a mortgage upon the premises, so that the widow is only dowable of an equity of redemption, unless the tenant holds under or by the right of such mortgage.[1]

§ 468. **Form of Judgment.** — If she prevails in her action, she obtains judgment for her dower and damages for its detention.[2]

§ 469. **Damages** were not originally recoverable in an action of dower. They were first given by the statute of Merton, c. 1, in an action against the heir for the land of which the husband died seised, and are declared to be "the value of the whole dower," "from the time of the death of the husband unto the day that the said widow by judgment of our court have recovered seisin of her dower," etc.[3] But by the English law, damages were not recoverable of any but the heir or abator or their assigns, in respect to lands of which the husband died seised.[4] The vendee of the heir, therefore, would be liable for damages in the same way as the heir himself,[5] but not the alienee of the husband.[6] The rule and measure of damages as to the mode of computing them seems to be the same in England and here; that is, one third of the value of the annual rents and profits of the estate out of which dower is claimed.[7] But in respect to the length of time for which this allowance shall be made, there is quite a difference in the laws of the different States.* In Virginia the widow can recover damages against her husband's alienee, in proceedings in equity, from the date of the subpœna.[8] In Pennsylvania she recovers from the death of the husband, where he died seised, although the tenant may have

* Note. — The rule as above stated seems to be the settled law, although the point that an extra sum should be allowed for the illegal detention of the dower is raised, and authorities tending to sustain it are cited, in Fisher *v.* Morgan, Coxe, 125.

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[1] Smith *v.* Eustis, 7 Me. 41; Thompson *v.* Boyd, 2 N. J. 543; Manning *v.* Laboree, 33 Me. 343; Hastings *v.* Stevens, 29 N. H. 564.

[2] Leavitt *v.* Lamprey, 13 Pick. 382.

[3] Co. 2d Inst. 80.

[4] Co. Lit. 32 *b*; Stearns, Real Act. 312; Thompson *v.* Colier, Yelv. 112; Fisher *v.* Morgan, Coxe, 125.

[5] Hitchcock *v.* Harrington, 6 Johns. 290.

[6] 2 Crabb, Real Prop. 120; Embree *v.* Ellis, 2 Johns. 119.

[7] Winder *v.* Little, 4 Yeates, 152; Sedgwick on Damages, 130; Layton *v.* Butler, 4 Harringt. 507; 4 Kent, Com. 65.

[8] Tod *v.* Baylor, 4 Leigh, 498.

been in possession but a part of the time since.[1] But in Delaware, in such case, she could recover damages only from the time of purchase by the tenant.[2] In Alabama, if the action be against the heir, damages are allowed from the death of the husband. If against a purchaser, they cover only the time from the commencement of the suit.[3] In Ohio and South Carolina no damages are allowed in an action of dower.[4] In Missouri and Wisconsin the widow has damages against the heir from the death of the husband; against husband's alienee, from the time of the demand for dower.[5] In Massachusetts, damages are allowed from the time of the demand, if the action be against the person of whom demand is made. If against a subsequent purchaser, they are only allowed from the time of his purchase and a separate action on the case may be maintained against the prior tenant to recover damages from the time of demand to the time of his conveyance.[6] The law is the same in New York, in respect to a purchaser, and damages are recoverable from the time of his purchase only.[7] And where the husband died seised, the widow was held entitled to rents and profits from the time of his death, to be apportioned upon the heirs and terre-tenants according to the length of time they occupied.[8] In Maryland, if the widow recover dower at common law against the husband's alienee, she may afterwards recover, by proceedings in equity, the rents and profits from the time dower was demanded.[9] In Maine, New Hampshire, and Rhode Island, damages are recoverable only from demand. In New Jersey, Pennsylvania, and Tennessee, the same rule as to damages is applied as in the English courts, where the claim is against the alience of the husband, and they are not allowed except where the husband dies seised.[10] And in New York, in addition to the restriction above mentioned, the widow cannot claim damages

[1] Seaton *v.* Jamison, 7 Watts, 533.

[2] Newbold *v.* Ridgeway, 1 Harringt. 55; Green *v.* Tenant, 2 Harringt. 336.

[3] Beavers *v.* Smith, 11 Ala. 20.

[4] Heyward *v.* Cuthbert, 1 McCord, 386; Bank of United States *v.* Dunseth, 10 Ohio, 18.

[5] McClanahan *v.* Porter, 10 Mo. 746; Thrasher *v.* Tyack, 15 Wis. 256.

[6] Whittaker *v.* Greer, 129 Mass. 417. [7] Russell *v.* Austin, 1 Paige, 192.

[8] Hazen *v.* Thurber, 4 Johns. Ch. 604. [9] Sellman *v.* Bowen, 8 Gill & J. 50.

[10] Fisher *v.* Morgan, Coxe, 125; Sharp *v.* Pettit, 4 Dall. 212; Waters *v.* Gooch, 6 J. J. Marsh. 586; Co. Lit. 32 *b*; Doct. & Stud. Dial. 2, c. 13.

for more than six years, nor for any time anterior to her demand made.[1] In North Carolina, in a process in equity to recover dower, a widow was held entitled to an account for mesne profits from the death of her husband up to the assignment of dower. And where buildings which had been insured were burned after the death of the husband, and before dower was assigned, she was held entitled to a *pro rata* share of the insurance money.[2] These damages, as already stated, are ordinarily found by the jury; but if there be a judgment by default, the court may assess the damages by assent of demandant, or send the question to a jury.[3]

§ 470. **Effect of Judgment.** — The judgment in an action of dower is regarded as having a double character, the recovery of seisin being by force of the common law, that of damages and costs by force of the statutes of Merton and Gloucester.[4] And these are so far independent of each other that the demandant may have a complete judgment for seisin of her dower, with damages or without them as the case may be.[5] And if verdict be for both, where no damages are recoverable, the court will treat the finding as to the damages as surplusage, and render judgment for the seisin.[6] But unless there be a judgment for her seisin of dower, she cannot have one for damages, — so that if by her death a recovery for the former fails, her estate has no remedy by way of damages for detention of the dower.[7] Nor can a demandant in an action of dower, as may be done in other real actions, enter upon the land recovered by the judgment without a formal writ of entry. And the reason is that in one case the demandant sues for and establishes his right to a specific parcel of land; in the other, the part she is to have can only be ascertained by the assignment of her dower.[8]

[1] Bell *v.* The Mayor, 10 Paige, 49, 70.

[2] Campbell *v.* Murphy, 2 Jones, Eq. 357, 363, 364.

[3] Stearns, Real Act. 311; Perry *v.* Goodwin, 6 Mass. 498.

[4] 2 Crabb, Real Prop. 186; Taylor *v.* Brodrick, 1 Dana, 345; Sharp *v.* Pettit, 4 Dall. 212. The statutes of Merton and Gloucester are a part of the common law of Delaware. Layton *v.* Butler, 4 Harringt. 507. See Appendix D.

[5] 2 Saund. 45, n. 4; Co. Lit. 32 *b*, n. 4; Waters *v.* Gooch, 6 J. J. Marsh. 586.

[6] Shirtz *v.* Shirtz, 5 Watts, 255.

[7] Atkins *v.* Yeomans, 6 Met. 438; Rowe *v.* Johnson, 19 Me. 146; Turney *v.* Smith, 14 Ill. 242; Tuck *v.* Fitts, 18 N. H. 171; Roan *v.* Holmes, 32 Fla. 295; s. c. 13 So. Rep. 339.

[8] Hildreth *v.* Thompson, 16 Mass. 191; Co. Lit. 34 *b*; Stearns, Real Act. 318.

§ 471. **Writ of Seisin.** — For this reason, after judgment in her favor, she may have a writ of *habere facias seisinam* directed to the sheriff, commanding him to cause her dower to be set out, and seisin thereof delivered to her, and to make a return of his doings thereon,[1] which writ may contain a clause of *fieri facias* for the recovery of damages under such a form of judgment.[2] But the form of the writ of seisin, and of the precept to the sheriff, would depend upon the law of the particular State where the judgment is rendered. Thus, the form in Rastell is simply a command to the sheriff to make an assignment and full seisin of a third part of the lands described, who in his return states that he has so done.[3]

§ 472. **How Writ of Seisin executed.** — In some of the States the sheriff causes dower to be set out by commissioners, who act under oath. But though the sheriff is bound by his precept to make a return of his doings into the court from which it issued, the demandant is not obliged to wait until such return is made and accepted before entering upon and taking possession of her dower land. She may enter as soon as the assignment is made and seisin given, subject only to the hazard of having her title defeated by some irregularity in the proceedings.[4] It sometimes happens, however, that the dower lands of the widow are subject to a term of years created before marriage. If there were no rent issuing out of such term, the widow takes her judgment with a *cessat executio* until the term shall have expired.[5] If, in the lease or grant of such a term, rent was reserved and payable, the widow might have her dower set off in the premises by metes and bounds, and, as reversioner, claim one third of the rents and profits without any *cessat executio* upon her judgment.[6]

§ 473. **Form of assigning Dower.** — As has been more than

[1] Rastell, Entries, 235.

[2] Stearns, Real Act. 317 ; Benner *v.* Evans, 3 Penn. 454.

[3] Rastell, Entries, 235.

[4] Co. Lit. 37 *b*, n. ; Parker *v.* Parker, 17 Pick. 236 ; Mansfield *v.* Pembroke, 5 Pick. 449.

[5] Co. Lit. 208 *a*, n. 105 ; Tud. Cas. 47 ; Maundrell *v.* Maundrell, 7 Ves. 567.

[6] Co. Lit. 32 *a* ; Stoughton *v.* Leigh, 1 Taunt. 402 ; Weir *v.* Tate, 4 Ired. Eq. 264.

once stated, the sheriff must, ordinarily, execute his precept by assigning the dower by metes and bounds, where the same can be done.[1] How far he may or must do this in respect to separate and distinct parcels of land may depend upon circumstances. If the lands were aliened in the life of the husband, the dower of the wife must be set out separately in the land of each alienee;[2] unless several parcels in which she has a right of dower are held by the same alienee, in which case it is proper to assign her dower out of one of the parcels.[3] The sheriff must use a reasonable discretion. And where he set out to a widow, as her dower, a third part by metes and bounds of every chamber in a house, the assignment was set aside, and a fine imposed upon the sheriff for contempt in so doing.[4] But where certain rooms in a house were set out with the privilege of using the halls, stairways, etc., for access to them, it was held to be a good assignment.[5] An assignment which gave the widow a right to cut wood upon or depasture land not set to her for dower would not be valid.[6] Where, from the nature of the estate out of which the dower is to be assigned, it cannot be done by metes and bounds, it may be done by giving a share in common of the estate, or an alternate occupation, or otherwise as may best serve the purposes of the law. In many cases a widow is dowable of money when this is the proceeds of land. But

[1] Perkins, § 414 ; Stearns, Real Act. 318 ; Pierce *v.* Williams, 2 Penningt. 521.

[2] Cook *v.* Fisk, Walker, 423 ; Coulter *v.* Holland, 2 Harringt. 330 ; Co. Lit. 35 *a* ; Doe *v.* Gwinnell, 1 Q. B. 682 ; Thomas *v.* Hesse, 34 Mo. 13.

[3] 1 Bright, Hus. & Wife, 367 ; Cazier *v.* Hinckey, 143 Mo. 203 ; s. c. 44 S. W. Rep. 1052.

[4] 2 Crabb, Real Prop. 147 ; 1 Bright, Hus. & Wife, 370 ; Abingdon's Case, cited in Howard *v.* Candish, Palm. 264. In an early Massachusetts case, Parsons, C. J., laid down this rule : "In the assignment of dower, commissioners are to regard the rents and profits only of the several parcels of the estate out of which the dower is to be assigned. When they have ascertained the annual income of the whole estate, they ought to set off to the widow such a part as will yield her one third part of such income, in parcels best calculated for the convenience of herself and the heirs. This rule is adopted equally to protect widows from having an unproductive part of estates assigned to them, and to guard heirs from being left, during the life of the widow, without means of support." Leonard *v.* Leonard, 4 Mass. 533. "This equitable rule has not been impaired by age." Fuller *v.* Conrad, 94 Va. 233 ; s. c. 26 S. E. Rep. 575.

[5] White *v.* Story, 2 Hill, 543.

[6] Jones *v.* Jones, Busbee (N. C.), 177.

this class of cases is considered elsewhere.[1] An instance of the former method of assigning, where it cannot be done by metes and bounds, would be that out of an estate held by the husband as tenant in common. The sheriff cannot set apart any portion of the estate as hers, and the widow becomes by the assignment tenant in common with the other owners of the land.[2] The case of a mill would be another example. In England she may be endowed of every third toll dish, or of a third part of the profits of the mill, and, it is added, she "may grind their toll free."[3] At common law, when the property is, in its nature, indivisible, dower is assigned out of the rents, issues, and profits to be had in common with the other owners.[4] This right is, in some States, as in Massachusetts, declared by statute.[5] So a share of the use, or of the profits, of a ferry should be assigned.[6]

§ 474. **How Dower assigned in Mines.** — Mines constitute a special class of estates, out of which a widow may be dowable, and the mode of assigning dower therein was fully considered in the case cited below.[7] It was there held that if the mine or mines formed a part of the value of the estate of which dower is to be had, it is not necessary that any part of such mines should be set out as dower, provided the widow have one third part in value of the entire estate assigned to her out of other parts of it. If the mine is embraced within what is set out by metes and bounds, it need not be described; for, if open, it may be used and worked as part of the dower for her own exclusive use. If any part of a mine or mines is set out which does not form a part of the estate which is defined by metes and bounds, but still forms a part of the general estate of which she is dowable, it should be specifically described. If the mine or mines be in another person's land, and open and wrought, and the same can be divided by metes and bounds so as not to prevent the other owners or proprie-

[1] See *ante*, § 377 ; *post*, § 479 *et seq.*

[2] Fitzh. N. B. 149 ; 1 Bright, Hus. & Wife, 371.

[3] 2 Crabb, Real Prop. 148 ; Perkins, § 415 ; 1 Bright, Hus. & Wife, 372.

[4] Stearns, Real Act. 319 ; Stevens *v.* Stevens, 3 Dana, 371.

[5] Pub. Stat. c. 174, § 12.

[6] Stevens *v.* Stevens, 3 Dana, 371.

[7] Stoughton *v.* Leigh, 1 Taunt. 402.

tors from enjoying a proper proportion of the profits thereof, her dower should be so divided and assigned. But if this cannot be done, the assignment should be so made as to give the widow one third part of the profits, as by a separate alternate enjoyment of the whole for short periods, or by giving her a certain proportion of the profits of such mine.[1] In making the assignment of dower, the estimate of the third part has reference to the productive value of the estate, and not the quantity. Such part of the estate should be set out to her as will give her one third part of the annual income or profits of the entire estate.[2] The time to which this estimate must refer, if the estate were sold in the life of the husband, and had been increased in productiveness by the purchaser, would be that at which the husband parted with it. If the husband die seised, it refers to the time of his death.[3]

§ 475. **Objection to Assignment.** — But if either party wish to raise objection to the manner or extent of the assignment, it should be done when the return of the officer who sets it out is made to the court.[4]

§ 476. **Mode of estimating Value of Estate.** — Notwithstanding what has been said, the question of the time in reference to which the value or income shall be estimated, has presented difficulties which have led to different rules in different jurisdictions. If the case be one where the claim is made of the heir, the rule is uniform in referring to the value and condition of the estate as it is when the dower is actually assigned, unless he shall have done acts to deteriorate it since the death of the husband. If he has enhanced the value of it, it is his own folly to have done so without first setting out the dower, and he cannot claim to have these

[1] See Coates *v.* Cheever, 1 Cow. 460, 478; Billings *v.* Taylor, 10 Pick. 460; Clift *v.* Clift, 87 Tenn. 17; s. c. 9 S. W. Rep. 360.

[2] Coates *v.* Cheever, 1 Cow. 460, 476; McDaniel *v.* McDaniel, 3 Ired. 61; Smith *v.* Smith, 5 Dana, 179; Leonard *v.* Leonard, 4 Mass. 533; Park, Dow. 255; Fuller *v.* Conrad, 94 Va. 233; s. c. 26 S. E. Rep. 575. But in England the estimate must refer to the condition of the estate at the time of the husband's death. Doe *v.* Gwinnell, 1 Q. B. 682.

[3] Davis *v.* Walker, 42 N. H. 482; Butler *v.* Fitzgerald, 43 Neb. 192; s. c. 47 Am. St. Rep. 741 and note; s. c. 61 N. W. Rep. 640.

[4] Chapman *v.* Schroeder, 10 Ga. 321.

improvements allowed to him in making the estimate.[1] And if the heir were to sow the husband's lands after his death, and these were to be set off to the widow, he could not claim the crops as emblements belonging to him.[2] So if, without the fault of the heir, the estate be diminished in value between the death of the husband and the assignment of the dower, she must bear, *pro rata*, this depreciation.[3] Nor could the sheriff in assigning dower have any regard to the fact that the estate had been deteriorated by the wrongful act of the heir. He could only set it out in reference to the then condition of the estate.[4] The dowress's remedy for the injury sustained by such deterioration must be sought by an action for damages,[5] though Judge Story, in Powell *v.* Monson,[6] is disposed to doubt the right of a widow in such cases to recover damages of the heir.[7] So far as the rule becomes applicable to the value of estates which have been deteriorated by waste or mismanagement while in the hands of an alienee of the husband, it is believed to be the same in both countries. The nature of a wife's interest during her husband's life is such, that if an alienee of the estate cause a permanent damage to it, she is without remedy, and must therefore be content to take her dower out of the estate as she finds it, when her right becomes consummated by the death of her husband.[8] Nor does there appear to be any essential difference between the laws of the two countries, where the estate after the alienation by the husband, and before the assignment of the dower, has become enhanced or diminished in value by natu-

[1] Catlin *v.* Ware, 9 Mass. 218; Thompson *v.* Morrow, 5 S. & R. 289: 1 Bright, Hus. & Wife, 385; Co. Lit., 32 *a*; Powell *v.* Monson, 3 Mason, 347, 368, 369.

[2] Parker *v.* Parker, 17 Pick. 236; Co. 2d Inst. 81.

[3] 1 Bright, Hus. & Wife, 385; Powell *v.* Monson, 3 Mason, 368.

[4] Co. Lit. 32 *a*; Powell *v.* Monson, 3 Mason, 368.

[5] 1 Bright, Hus. & Wife, 385; 2 Crabb, Real Prop. 138; 1 Roper, Hus. & Wife, 349.

[6] Powell *v.* Monson, 3 Mason, 368; Campbell *v.* Murphy, 2 Jones, Eq. 389.

[7] Doe *v.* Gwinnell, 1 Q. B. 682; Campbell *v.* Murphy, *supra*, 363.

[8] McClanahan *v.* Porter, 10 Mo. 746; Thompson *v.* Morrow, 5 S. & R. 289; Perkins, § 329; 1 Bright, Hus. & Wife, 386; Powell *v.* Monson, 3 Mason, 368; Sanders *v.* McMillian, 98 Ala. 144; s. c. 39 Am. St. Rep. 19 and note; s. c. 11 So. Rep. 750. And the suggestion of relief in equity thrown out in Beavers *v.* Smith, 11 Ala. 20, does not seem to have been acted on in any decided case. In Westcott *v.* Campbell, 11 R. I. 378, however, the rule itself is mentioned with disapproval.

ral or extraneous causes, independent of improvements made by the alienee himself. The widow in such case may share in the increased, as she must in the decreased, value of the estate.[1] In New York, owing to the language of the statutes of that State, the value of the estate at the time of its alienation is the criterion for determining what proportion shall be set off as the widow's share.[2] And a similar rule prevails in other States by statute.[3] In Alabama, though at first treated as doubtful how far a widow could avail herself of the rise in value of the estate by extraneous causes,[4] she is now allowed to share therein.[5] This doctrine may be considered as in accordance with the general policy of the American law, and as being generally the common law of the country.[6] And in respect to the question whether, and how far a widow shall have the benefit of improvements made by the alienee of the husband, the law in the United States seems to be uniform, and will be found to be much more in harmony with the policy of a young and thriving community, where new lands are purchased for the purpose of improving them by the expenditure of money and labor, and where villages and cities are seen springing up within the life of a single individual. For such a community the rule of the English law would be found altogether unsuited, though it may be well adapted to the habits of a people where the inconveniences growing out of the exercise of dower rights have for a long time been, to a great extent, avoided by mar-

[1] Smith *v.* Addleman, 5 Blackf. 406 ; Wms. Real Prop. 191, note ; 1 Cruise, Dig. 171 ; Powell *v.* Monson, 3 Mason, 347, 375 ; Johnston *v.* Vandyke, 6 McLean, 422; Braxton *v.* Coleman, 5 Call, 433 ; Bowie *v.* Berry, 1 Md. Ch. Dec. 452; Powell *v.* Monson, 3 Mason, 375 ; Gore *v.* Brazier, 3 Mass. 523, 544 ; Thompson *v.* Morrow, 5 S. & R. 289. See 4 Kent, Com. 67-69 ; Dunseth *v.* United States Bk., 6 Ohio, 76 ; Young *v.* Thrasher, 115 Mo. 222 ; s. c. 21 S. W. Rep. 1104.

[2] Braxton *v.* Coleman, 5 Call, 433; Walker *v.* Schuyler, 10 Wend. 480.

[3] Tod *v.* Baylor, 4 Leigh, 498. See statutes at the end of § 489.

[4] Barney *v.* Frowner, 9 Ala. 901.

[5] Beavers *v.* Smith, 11 Ala. 20 ; Francis *v.* Garrard, 18 Ala. 794 ; Thrasher *v.* Pinkard, 23 Ala. 616 ; Wood *v.* Morgan, 56 Ala. 397; Sanders *v.* McMillian, 98 Ala. 144 ; s. c. 11 So. Rep. 750.

[6] Wooldridge *v.* Wilkins, 3 How. (Miss.) 360 ; Mosher *v.* Mosher, 15 Me. 371 ; Green *v.* Tennant, 2 Harringt. 336 ; Summers *v.* Babb, 13 Ill. 483 ; Sedgwick on Damages, 133 and note ; Dunseth *v.* United States Bk., 6 Ohio, 76. See also 4 Kent, Com. 68.

riage settlements and other similar provisions. The citation of a single case from each of several States, out of the many that may be readily found in the reports, will be sufficient to establish the law of this country to be, that where buildings have been erected, improvements made, or the value of lands enhanced by money expended or labor done by the alienee of the husband, upon the land out of which dower is claimed, the benefit of these is not to be shared by the widow.[1]

§ 477. **Improvements, how availed of.** — In respect to the time when and manner in which the tenant is to suggest that improvements have been made in the premises, in order to have a proper judgment rendered in any case, the law does not seem to be uniform. It should be done by some proper plea or suggestion upon the record, and not by the way of controverting the right of the demandant to recover her dower.[2] And where the tenant, by his plea, denied the marriage and seisin of the husband, the court say, "We cannot, from these pleadings, understand that any improvements have been made since then (the alienation), or of what nature or value, to be excluded from the judgment to be rendered."[3] In New York, the court say, the value may be ascertained in

[1] 4 Kent, Com. 65; Humphrey *v.* Phinney, 2 Johns. 484; Thompson *v.* Morrow, 5 S. & R. 189; Catlin *v.* Ware, 9 Mass. 218; Powell *v.* Monson, 3 Mason, 347; Tod *v.* Baylor, 4 Leigh, 498; Leggett *v.* Steele, 4 Wash. C. C. 305; Wilson *v.* Oatman, 2 Blackf. 223; Brown *v.* Duncan, 4 McCord, 346; Wooldridge *v.* Wilkins, 3 How. (Miss.) 360; Larrowe *v.* Beam, 10 Ohio, 498; Hobbs *v.* Harvey, 16 Me. 80; Barney *v.* Frowner, 9 Ala. 901; McClanahan *v.* Porter, 10 Mo. 746; Bowie *v.* Berry, 3 Md. Ch. Dec. 359; Rawlins *v.* Buttel, 1 Houst. (Del.) 224. In a Maine case, where improvements had been made by the alienee, the widow had such a share of the whole estate set out to her as would produce an income equal to one third part of what the whole estate would produce if no improvements had been made upon it after it had been conveyed by the husband. Carter *v.* Parker, 28 Me. 509; Manning *v.* Laboree, 33 Me. 343. Where, however, the grantee had subdivided the land, the widow was entitled, as against each parcel, to the general rise in value from the improvements made on the others. Boyd *v.* Carlton, 69 Me. 200. And in Alabama, where a dilapidated mill upon the premises was torn down by the alienee of the husband, and a new and expensive structure erected in its stead, it was held that the widow of the grantor was not entitled to any share of the improvements, and that her dower should be set out with reference to the value of the premises at the time of the alienation, though the destruction of the old mill afforded a proper case for compensation to the widow by a court of equity. Beavers *v.* Smith, 11 Ala. 20. See Sturtevant *v.* Phelps, 16 Gray, 50.

[2] Stearns, Real Act. 317; Coxe *v.* Higbee, 6 Halst. 395.

[3] Ayer *v.* Spring, 10 Mass. 80.

one of three ways: either by a jury upon the trial of the issue, or by the sheriff on the writ of seisin, or by a writ of inquiry founded upon proper suggestions.[1]

§ 478. **Assignment de novo.** — If the widow be evicted from the land assigned as dower by one having a better title, she may have dower assigned *de novo* out of the balance of the estate; provided her assignment was of common right. But where the assignment is against common right, she has no remedy if it fails.[2] She could not, under either mode of assignment, avail herself, for relief, of the covenant of warranty made to her husband, since she is not the assignee of the whole estate in the lands set out to her as dower.[3] If her dower was at first set off upon a judgment of court, her remedy, in case she is deprived of any part of her dower land, would be by *scire facias*, whereupon a new writ of *habere facias* would issue, which is to be served and returned like the first.[4] Nor is this remedy of an assignment *de novo* confined to a claim in favor of the widow alone. It may be applied, in some cases, to reduce the dower set out to her. Thus, where there was an action pending against the husband for the recovery of a pretty large proportion of his estate, at the time of his death, and dower was assigned to his widow out of the entire estate, and afterwards the demandant prevailed in his action and recovered a large part of the estate of which husband died seised, not set out to her, it was held that a new assignment should be made, having reference to the estate belonging in fact to the husband.[5]

§ 479. **Widow's Remedy in Equity.** — A widow's remedy in equity for the recovery of dower is, in some respects, broader than at law. It embraces a large class of cases for which the

[1] Dolf *v.* Bassett, 15 Johns. 21. It is suggested in Stearns on Real Actions, 317, that a convenient mode of doing this would be by having the increased value found by the jury at the bar of the court, as is done in actions to recover lands where the tenant claims allowance for improvements. See Mass. Pub. Stat. c. 173, §§ 17-23.

[2] Jones *v.* Brewer, 1 Pick. 314; Scott *v.* Hancock, 13 Mass. 162; Holloman *v.* Holloman, 5 Sm. & M. 559; Mantz *v.* Buchanan, 1 Md. Ch. Dec. 202; French *v.* Pratt, 27 Me. 381; Tud. Cas. 52; Perkins, § 418.

[3] St. Clair *v.* Williams, 7 Ohio, 2d Pt. 110.

[4] Stearns, Real Act. 321; 2 Crabb, Real Prop. 151.

[5] Singleton *v.* Singleton, 5 Dana, 87.

common law furnishes no adequate remedy. Among these are all cases of trust estates and equities of redemption, and also many cases where, by sale or otherwise, the land has been converted into money, without extinguishing the widow's right in equity to share in the proceeds. A resort to equity is always a convenient and desirable mode, where it is necessary to call upon the tenant to disclose his title or state an account of mesne profits, and the like;[1] though in all cases where the widow's right of dower is controverted in proceedings in equity, the court sends the case to a court of common law jurisdiction to have the question determined by a jury.[2] And in Vermont, if demandant first goes into chancery for her dower, in order to clear off mortgages and the like, the court in the end will remit the proceedings to the probate court[3] for the final assignment of the dower. Among the cases where the only remedy for the recovery of dower is through a court of chancery, are those where it is claimed out of an equity of redemption, and the claim is against the mortgagee or his assigns, even though the mortgagee may have purchased the husband's equity of redemption.[4] And the same rule applies where a party interested has redeemed the mortgage, and the widow of the mortgagor demands dower against him.[5] So chancery has exclusive jurisdiction where the estate out of which dower is claimed was held in trust, actually or constructively, for the benefit of the husband.[6] Where the wife joined in a mortgage containing a power of sale, and there was reserved to the mortgagor whatever surplus, in the event of a sale, there might be after satisfying

[1] 2 Crabb, Real Prop. 189; Swaine *v.* Perine, 5 Johns. Ch. 482.

[2] Park, Dow, 329; Swaine *v.* Perine, 5 Johns. Ch. 482; Sellman *v.* Bowen, 8 Gill & J. 50.

[3] Danforth *v.* Smith, 23 Vt. 247.

[4] Bird *v.* Gardner, 10 Mass. 366; Gibson *v.* Crehore, 3 Pick. 475; Swaine *v.* Perine, 5 Johns. Ch. 482; Vandyne *v.* Thayre, 19 Wend. 162; Heth *v.* Cocke, 1 Rand. 344; Wooldridge *v.* Wilkins, 3 How. (Miss.) 360; Smith *v.* Eustis, 7 Me. 41; Thompson *v.* Boyd, 22 N. J. 543; Brown *v.* Lapham, 3 Cush. 551; Woods *v.* Wallace, 30 N. H. 384; Wing *v.* Ayer, 53 Me. 138; McArthur *v.* Franklin, 16 Ohio St. 193, 205.

[5] Cass *v.* Martin, 6 N. H. 25; Gibson *v.* Crehore, 5 Pick. 146; Hastings *v.* Stevens, 29 N. H. 564.

[6] Smiley *v.* Wright, 2 Ohio, 506; Taylor *v.* McCrackin, 2 Blackf. 260; Coughs *v.* Elliott, 23 N. H. 182; *post*, § 481.

the mortgage debt, his widow was held entitled to her dower out of such surplus, and a court of equity secured the same to her, by causing one third part of it to be invested for that purpose.[1] So, where, as in New York, the surrogate has power, when the husband dies indebted, to cause the estate to be sold, discharged of the widow's claim for dower, the court will cause one third part of the purchase-money to be put at interest, for her benefit, as dower.[2] And it may be laid down as an almost universal proposition, that where estates out of which widows were entitled to dower have been sold by order of court, or have been so sold as to give courts of equity jurisdiction over the money, these courts will allow the widow's dower out of the moneys.[3] So where the vendor, holding a lien for purchase-money, enforces it after the husband's death by a sale under decree of chancery, the vendee's widow is entitled to dower in the surplus after satisfying the

[1] Denton *v.* Nanny, 8 Barb. 618 ; Brewer *v.* Vanarsdale, 6 Dana, 204 ; Mills *v.* Van Voorhis, 23 Barb. 125, 136. The cases sustaining the doctrine of the text have already been cited, *ante*, § 377 and note ; and that the inchoate right of dower will be protected in equity, and the wife's rights in the surplus after satisfying the mortgage debt will be sustained, seems established by the clear weight of authority. In giving relief, the rule has been adopted by some courts to set aside one third of the surplus in trust to permit the wife to receive the income when a widow, Vreeland *v.* Jacobus, 19 N. J. Eq. 231 ; but the better rule — at least, where any one but the husband is interested in the surplus — is to estimate the present value at a sum in gross, Unger *v.* Leiter, 32 Ohio St. 210. In Denton *v.* Nanny, *supra*, the court of New York held that the right of a wife in a mortgaged estate would not be barred by proceedings against her husband to which she was not a party, and that, in such case, the court would have one third of the surplus proceeds of the sale of the estate, after paying the mortgage, set apart and invested on interest for the joint lives of her and her husband, and for her life, if surviving him, as her dower right.

[2] Lawrence *v.* Miller, 1 Sandf. 516 ; s. c. 2 N. Y. 245 ; Higbie *v.* Westlake, 14 N. Y. 281.

[3] Jennison *v.* Hapgood, 14 Pick. 345, in which the executor of a will sold his testator's mortgaged estate, and purchased it himself, paying the mortgage in part out of the assets in his hands, and in part out of his own funds ; and the widow, as she chose to affirm the sale, was held entitled to dower in one third part of what the estate sold for, and one third part of what was paid towards the mortgage out of the assets of the estate ; Titus *v.* Neilson, 5 Johns. Ch. 452 ; Church *v.* Church, 3 Sandf. Ch. 434, in which shares of tenants in common were sold by order of court to effect partition, and the widow of one of the tenants was held entitled to dower out of the proceeds of the sale ; Willet *v.* Beatty, 12 B. Mon. 172 ; Mills *v.* Van Voorhis, 23 Barb. 125 ; Warren *v.* Twesley, 10 Mo. 39 ; Weaver *v.* Gregg, 6 Ohio St. 547, 552.

lien.[1] And where several tenants in common, with their wives, conveyed the estate to trustees to sell, one of the grantors having died, his widow was held entitled to one third of the income of the money for which his share sold, as her dower.[2]

§ 480. **Contribution.** — A similar rule is applied in estimating the relative value of a widow's dower to that of the whole estate, as in ascertaining the share of any charge or burden upon the estate which she must bear as dowress (see *ante*, § 241). And this is especially applicable where she is to be endowed out of moneys, the proceeds of the sale of real estate, from which is to be deducted what the tenant may have paid to redeem the mortgage, assigning the widow her dower according to the value of the residue.[3] If the husband be the grantee of a part of the mortgaged premises, and his widow seeks to recover dower in the same, she will in the end be obliged to contribute or allow such part of the mortgage debt as her interest in her husband's portion of the estate bears in value to the whole estate.[4] Where the widow pursues her remedy in equity for the recovery of dower, it seems that the setting out of the dower, as well as the ascertaining the amount she shall contribute, may be done by a master or by commissioners, in the discretion of the court.[5] If, however, she shall have had her dower set out at common law, without reference to the mortgage, she may have her bill to redeem, and as between her and her reversioner and the owner of the other two thirds of the estate, she must contribute, *pro rata*, according to the relative values of their respective interests.[6]

§ 481. **Contribution, how estimated.** — In determining the amount which the dowress shall contribute toward the mortgage debt as forming her *pro rata* portion thereof, the rule

[1] Williams *v.* Wood, 1 Humph. 408 ; McClure *v.* Harris, 12 B. Mon. 261 ; Willet *v.* Beatty, 12 B. Mon. 172.

[2] Hawley *v.* James, 5 Paige, 318.

[3] Newton *v.* Cook, 4 Gray, 46.

[4] Carll *v.* Butman, 7 Me. 102.

[5] Swaine *v.* Perine, 5 Johns. Ch. 482. See also Van Vronker *v.* Eastman, 7 Met. 157, and Wood *v.* Wallace, 30 N. H. 384.

[6] Danforth *v.* Smith, 23 Vt. 247.

is to require her to pay what will be equivalent to one third of the annual interest during her life.[1] But this must be paid in a gross sum, and not in the way of an annual payment, unless the mortgagee elects not to enforce the payment of the principal sum, in which case she must contribute to keep down one third of the interest.[2] This gross sum is calculated by considering this interest as an annuity, to continue as long as, by the chances of life, she is to live, and computing its present worth. So, on the other hand, where money is assigned in lieu of dower, the widow receives, in most of the States, a gross sum instead of an annuity, or a share of the annual income.[3] In others it is held that such a composition cannot be made by order of the court except by agreement of the parties.[4] In South Carolina, the courts adopt as an arbitrary rule the principle that a widow's estate for life in one third is equal to one sixth of the entire fee in the whole estate.[5] In Alabama, Tennessee, and in the United States courts, it is not held competent to assign to a widow a gross sum. It can only be decreed that the annual value of the dower be paid her annually.[6] But in Maryland, Kentucky, and Maine, cases have arisen where the courts have decreed her a sum in gross in such cases, calculated upon her chances of life.[7] And the same rule is adopted in Massachusetts. In New York, in an early case, the court, without going into the reasons for so doing, directed the fund out of which her dower was to come, to be invested, and the income paid over to her during life.[8]

[1] Swaine *v.* Perine, 5 Johns. Ch. 482 ; McArthur *v.* Franklin, 16 Ohio St. 193, 205.

[2] Bell *v.* The Mayor, 10 Paige, 70; Wing *v.* Ayer, 53 Me. 138.

[3] 2 Scribner, Dow. 654, n.

[4] Virginia, Georgia, and Arkansas. 2 Scribner, Dow., *ubi supra.* See Johnson *v.* Gordon, 102 Ga. 350 ; s. c. 30 S. E. Rep. 507.

[5] Wright *v.* Jennings, 1 Bailey, 277 ; Garland *v.* Crow, 2 Bailey, 24 ; *ante,* § 241, note.

[6] Johnson *v.* Elliott, 12 Ala. 112 ; Beavers *v.* Smith, 11 Ala. 20 ; Francis *v.* Garrard, 18 Ala. 794; Lewis *v.* James, 8 Humph. 537 ; Summers *v.* Donnell, 7 Heisk. 565 ; Herbert *v.* Wren, 7 Cranch, 370.

[7] Goodburn *v.* Stevens, 1 Md. Ch. Dec. 420, 441 ; Brewer *v.* Vanarsdale, 6 Dana, 204 ; Simonton *v.* Gray, 34 Me. 50 ; Carll *v.* Butman, 7 Me. 102; Jennison *v.* Hapgood, 14 Pick. 345.

[8] Titus *v.* Neilson, 5 Johns. Ch. 452.

§ 482. **Equity has no Jurisdiction to commute Dower.** — [A court of equity has no jurisdiction (unless given by statute) to entertain a bill by the widow to sell the land of the heir and award her money out of the proceeds of the sale in commutation of dower. And a decree of sale upon such a bill would be not merely erroneous, but void.[1]]

[1] Hoback *v.* Miller, 44 W. Va. 635; s. c. 29 S. E. Rep. 1014.

CHAPTER XV.

DOWER — NATURE OF THE ESTATE IN DOWER.

§ 483. Nature of the widow's interest.
484. Interest of widow before assignment.
485. Estate of dowress after assignment.
486. No privity between dowress and reversioner.
487. Incidents to dower — Waste — Incumbrances.
488. May use land in accustomed mode.
489. When land assigned in different parcels.
NOTE. Statutes concerning wife's interest in husband's property.

§ 483. **Nature of the Widow's Interest.** — The nature of the interest which, inchoate in the wife, becomes consummate in the widow, in the way of dower, deserves a distinct notice, since, in many respects, it is unlike any other known to the law.[1] At common law, the moment her coverture and her husband's seisin concur, she acquires a right which nothing but her death or her voluntary act can defeat, unless it be by an exercise of sovereignty by the forms of the law in appropriating the estate of the husband to a public use. No adverse possession, therefore, as against her husband, however long continued, can affect her right to recover dower after his decease.[2] It is no right which her husband can bar or incumber; nor she herself, except by deed in which her husband joins, and then it is only in the way of estoppel, for her deed even of grant does not pass any title to the estate.[3] She has not, in this stage of her right, even a *chose in action* in respect to the estate; nor can she protect it in any way from waste or deterioration by her husband or his alienee; nor is her right at law in any sense an interest in real estate, nor

[1] Park, Dow. 334.
[2] Durham *v.* Angier, 20 Me. 242; Moore *v.* Frost, 3 N. H. 126.
[3] Learned *v.* Cutler, 18 Pick. 9. Cf. Maxon *v.* Gray, 14 R. I. 641.

property of which value can be predicated.[1] She cannot convey it, nor is it a thing to be assigned by her during the life of the husband.[2]

§ 484. **Interest of Widow before Assignment.** — But immediately upon the death of her husband, her right becomes consummate and perfect; and if the heir then waste or deteriorate the estate, she may have a remedy for the loss thereby occasioned to her. But as her right is still a mere *chose in action*, she has nothing of which *estate* can, at this stage of her interest, be predicated.[3] She is not seised of any part of the lands, on the death of her husband, by any right of dower, until it is assigned to her.[4] In Vermont, however, she becomes entitled to possession and enjoyment of the estate, in common with the heirs of her husband, of an undivided third part, which she may continue to hold during her life without a previous formal assignment of dower.[5] So in Connecticut, before her dower has been assigned to her, she has the rights of a tenant in common with the heirs-at-law of the husband.[6] But a surrender by deed, with covenants of warranty, by her, would estop her from claiming dower in the premises.[7] She has no estate in the lands, nor anything which she can assign or convey to another, or which can be taken in execution for her debt;[8] though in Alabama and Indiana an assignment by a widow of her right in lands in which her husband died seised, was held to be valid.[9] And in Indiana she was held to have such an interest as she could assign in lands of which

[1] Moore *v.* The Mayor, 8 N. Y. 110; McArthur *v.* Franklin, 16 Ohio St. 193, 200. As to her rights in equity, see *ante*, §§ 377, 479.

[2] Gunnison *v.* Twitchell, 38 N. H. 62.

[3] 4 Kent, Com. 61; Green *v.* Putnam, 1 Barb. 500; Stewart *v.* McMartin, 5 Barb. 438; Johnson *v.* Shields, 32 Me. 424; Cox *v.* Jagger, 2 Cow. 638, 651; Shields *v.* Batts, 5 J. J. Marsh. 12; Hoxsie *v.* Ellis, 4 R. I. 123; Saltmarsh *v.* Smith, 32 Ala. 404; Stewart *v.* Chadwick, 8 Iowa, 463; Aikman *v.* Harsell, 98 N. Y. 186.

[4] Sheafe *v.* O'Neil, 9 Mass. 9; Weaver *v.* Crenshaw, 6 Ala. 873.

[5] Dummerston *v.* Newfane, 37 Vt. 9. See Mass. Pub. Stat. c. 124, § 14.

[6] Wooster *v.* Hunt's Lyman Iron Co., 38 Conn. 256.

[7] Jackson *v.* Wright, 14 Johns. 194.

[8] Brown *v.* Meredith, 2 Keen, 527; Green *v.* Putnam, 1 Barb. 500; Gooch *v.* Atkins, 14 Mass. 378; Saltmarsh *v.* Smith, 32 Ala. 404; Rausch *v.* Moore, 48 Iowa, 611. See Pope *v.* Mead, 99 N. Y. 635, that she may assign.

[9] Powell *v.* Powell, 10 Ala. 900; Matlock *v.* Lee, 9 Ind. 298.

her husband had been seised during coverture, although he had conveyed the same in his lifetime, and the assignee may sue in his own name.[1] But her right is not one against which a statute of limitation runs in favor of a tenant as being adversely seised, unless expressly embraced in such statute;[2] nor is it such an interest as to be affected by any proceedings for foreclosure by a mortgagee against her husband, unless she is made a party by proper notice. Thus, where the husband bought an equity of redemption, and afterwards sold it to the mortgagee, who, in order to perfect his title, gave notice to the husband that he held for foreclosure, as the law stood before the Revised Statutes in Massachusetts, it was held that the wife was not affected by such proceedings. In order to be effectual as to her, she must be notified after her husband's death, and the mortgagee must hold for the requisite time afterwards.[3] The principle above stated, that, until assignment made, dower is not the subject of sale or conveyance so as to vest a legal title in the assignee or alienee, and enable him to sue for it in his own name, is recognized in courts of equity as well as law.[4] But where such sale or assignment is made, equity will protect the rights of the assignee and sustain an action in the widow's name for his benefit.[5] And if she sells her right and gives the purchaser a power of attorney for the purpose, he may prosecute an action and recover dower in her name in her stead.[6] And where a widow sold her right of dower to one of the heirs of her husband, who brought a bill in equity against the heirs and himself, to have her dower set out to him, the court decreed the same to be done.[7] But under her rights at law, that of dower prior to assignment vests in action only, and

[1] Strong *v.* Clem, 12 Ind. 37.

[2] 4 Kent, Com. 70; Parker *v.* Obear, 7 Met. 24; Spencer *v.* Weston, 1 Dev. & B. 213; Guthrie *v.* Owen, 10 Yerg. 339; Barnard *v.* Edwards, 4 N. H. 107; Angell on Limit. § 367.

[3] Lund *v.* Woods, 11 Met. 566.

[4] Tompkins *v.* Fonda, 4 Paige, 448; Torrey *v.* Minor, 1 Sm. & M. Ch. 487; Harrison *v.* Wood, 1 Dev. & B. Eq. 437.

[5] Lamar *v.* Scott, 4 Rich. 516; Powell *v.* Powell, 10 Ala. 900.

[6] Robie *v.* Flanders, 33 N. H. 524. See McMahon *v.* Gray, 150 Mass. 289; s. c. 22 N. E. Rep. 923.

[7] Potter *v.* Everitt, 7 Ired. Eq. 152.

cannot be aliened. The most she can do is to release it to some one who is in possession of the lands, or to whom she stands in privity of estate; she cannot invest another with it.[1] She cannot, therefore, mortgage it before it is assigned, nor lease it; and a covenant to pay rent to her does not bind the assignee of the covenantor.[2] [Courts of law, however, so far recognize her assignment of her right as to allow the assignee to prosecute an action for dower in her name.[3]] Of so little effect is the conveyance of a widow's mere right of dower, that where the first of two successive widows entitled to dower out of the same estate conveyed to the tenant her right before the dower was assigned, it was held to be an extinguishment of her right, so that when the second came to claim her dower, the tenant could not make use of the conveyance to affect her claim to be endowed out of the whole estate.[4] And where a man married a widow, whose dower in her first husband's estate had not been set out, and assigned all his estate and effects of which he was possessed in right of his wife or otherwise, it was held not to carry any right which she had to have her dower assigned.[5] On the other hand, where a mortgagee undertook to foreclose against a mortgage made during coverture by the husband, but to which she was no party, and to that end made her a party to the bill, it was held that she was not affected by the decree, for as dowress she held by a title paramount to the mortgage. Nor could she in such a suit contest the validity of the mortgage.[6] Still, her interest is not such that at common law she could bring ejectment, or maintain a process for partition, in respect to lands of her deceased husband.[7] If she entered upon such lands except under her right of quarantine, she would be

[1] Blain *v.* Harrison, 11 Ill. 384; Summers *v.* Babb, 13 Ill. 483; Jackson *v.* Vanderheyden, 17 Johns. 167; Johnson *v.* Shields, 32 Me. 424; Park, Dow. 335.

[2] Strong *v.* Bragg, 7 Blackf. 62; Croade *v.* Ingraham, 13 Pick. 33.

[3] Robie *v.* Flanders, 33 N. H. 524; McMahon *v.* Gray, 150 Mass. 289; s. c. 22 N. E. Rep. 923.

[4] Elwood *v.* Klock, 13 Barb. 50.

[5] 2 Crabb, Real Prop. 149; Brown *v.* Meredith, 2 Keen, 527.

[6] Lewis *v.* Smith, 9 N. Y. 502.

[7] Pringle *v.* Gaw, 5 S. & R. 536; Doe *v.* Nutt, 2 Car. & P. 430; Coles *v.* Coles, 15 Johns. 319; Bradshaw *v.* Callaghan, 5 Johns. 80.

a trespasser, and would be as to the heir an abator, if her husband died seised. Or if she held possession beyond the period of her quarantine, she would become a trespasser, and liable to be expelled by the heir by ejectment.[1] And if she obtain possession under form of legal process of assignment, and the assignment prove void, she may be regarded as a disseisor.[2] And, as observed by a legal writer, this is probably the only case where a person who has a title, unopposed by any adverse right of possession, may not reduce it to possession by an entry upon the estate.[3] When she has prosecuted her claim for dower to judgment, it seems to give so much consistency to her title, that if she then release it to the tenant in possession, it will not extinguish it, but he may avail himself of it against a second widow claiming dower in the same estate.[4] But still she could not herself enter upon land as her dower except in pursuance of the execution of a writ of *habere facias*.[5] Though she need not wait until such writ has been returned into court, as soon as her dower is designated under such writ, she may enter and enjoy it, subject only to the hazard of having the proceedings set aside for informality, and there becoming a *tort feasor* by such entry and occupancy.[6] In the execution of such a writ, the widow has no right to elect in which part of the estate her dower shall be set out, provided one third part in value be assigned to her.[7] Nor is it until her dower has been assigned, in some of the modes heretofore pointed out, that the estate of a dowress becomes consummated and clearly fixed and ascertained.

§ 485. **Estate of Dowress after Assignment.** — But the moment this has been done, and she has entered upon the premises

[1] Corey *v.* People, 45 Barb. 262.

[2] 4 Kent, Com. 61 ; Jackson *v.* O'Donaghy, 7 Johns. 247 ; Hildreth *v.* Thompson, 16 Mass. 191; McCully *v.* Smith, 2 Bailey, 103 ; Park, Dow. 336 ; Sharpley *v.* Jones, 5 Harringt. 373.

[3] Park, Dow. 334.

[4] Leavitt *v.* Lamprey, 13 Pick. 382.

[5] Evans *v.* Webb, 1 Yeates, 424.

[6] Co. Lit. 37 *b*, n. ; Parker *v.* Parker, 17 Pick. 236 ; 2 Crabb, Real Prop. 152.

[7] Taylor *v.* Lusk, 7 J. J. Marsh. 636. But it is prescribed by statute in many States that the assignment of the dower or other interest taken by the widow in her husband's estate shall, if possible, include the dwelling-house.

assigned her, the freehold therein is vested in her by virtue and in continuance of her husband's seisin.[1] Therefore, though upon the death of the husband his heir enters and gains actual seisin of the premises, as soon as the widow enters under her assignment of dower it destroys his seisin at once of so much of the inheritance, and he is thenceforward considered as never having been seised thereof.[2] Yet she cannot, after her dower is assigned, have assumpsit for use and occupation of her dower land against the tenant who has held it since her husband's death, although no damages shall have been allowed her, when she recovered judgment for her dower.[3]

§ 486. **No Privity between Dowress and Reversioner.** — Nor does she as tenant in dower hold her estate of the heir or tenant who set it out to her, but of her deceased husband, or rather by appointment of the law.[4] The law, moreover, does not consider that there is any privity of estate between the dowress and the reversioner of her lands.[5] Nor would she be bound by any proceedings in court which relate to the sale of her husband's interest in those lands.[6] And so independent of the heir is the estate of a dowress, that where he assigned dower lands to a widow, and at the same time, by the same act, limited a remainder to a third person, dependent upon her life estate as a particular estate to support it, it was held to be a void limitation as to the remainder, since her freehold was not of his creation, nor could he unite it to the remainder so as to make them one estate when taken together.[7]

§ 487. **Incidents to Dower — Waste — Incumbrances.** — [The widow's estate is one for life. Its incidents ordinarily cease

[1] Co. Lit. 339 *a*; Park, Dow. 339, 340; Windham *v.* Portland, 4 Mass. 348; Lawrence *v.* Brown, 5 N. Y. 394; Jones *v.* Brewer, 1 Pick. 314.

[2] Powell *v.* Monson, 3 Mason, 368; Park, Dow. 340; Gilb. Ten. 27; Lawrence *v.* Brown, 5 N. Y. 394; Perkins, § 424; Norwood *v.* Marrow, 4 Dev. & B. 442; 2 Crabb, Real Prop. 143.

[3] Thompson *v.* Stacy, 10 Yerg. 493; Sutton *v.* Burrows, 2 Murph. 79; Andrews *v.* Andrews, 14 N. J. 141. Cf. Parks *v.* McLellan, 44 N. J. L. 552.

[4] Conant *v.* Litle, 1 Pick. 189; Baker *v.* Baker, 4 Me. 67; Park, Dow. 340.

[5] Adams *v.* Butts, 9 Conn. 79.

[6] Lawrence *v.* Brown, 5 N. Y. 394.

[7] Park, Dow. § 341. See Plowd. 25.

with her life.[1] The dowress must keep] down one third of the interest upon the incumbrances or charges upon the estate, subject to which she holds her dower.[2] She is answerable for waste committed upon the premises, whether by herself or a stranger, as she is bound to protect the reversioner's interest.[3] Sometimes, however, she may use one part of her dower land in preference to another, and thereby be exonerated from liability for waste, when she would have been liable if it had been the only estate set out to her. As where the commissioners set out one third part of eight different parcels into which they divided the estate, and one of these was woodland, it was held that though, as a general proposition, she would be bound to use each parcel as if it had been the only land of which her husband died seised, she might in such case take wood and timber from that lot for the use of the cultivated land.[4] And in Ohio, where an unproductive town lot, together with an unimproved wood-lot, were set out as a widow's dower, it was held not to be waste to cut off and sell enough wood from the woodland to pay the taxes upon both parcels.[5] In some States, if a widow is endowed with wild lands, she may clear a part thereof, if necessary, for cultivation.[6]

§ 488. **May use Land in Accustomed Mode.** — And if the mode of using the land has consisted in cutting the growth upon it as the customary source of profit, the widow may continue to do so. Thus, to cut and sell staves and shingles,[7] or hoop

[1] Hoffman *v* Savage, 15 Mass. 130. But where a certain part of a house was set out as dower with certain easements in other parts of it as appurtenant, and the parts not set out to the widow were sold and described as being all the estate not assigned to her, it was held that at her death these easements continued appurtenant to the dower portion in the hands of the heirs. Symmes *v.* Drew, 21 Pick. 278.

[2] 2 Crabb, Real Prop. 154.

[3] Ibid. 155.

[4] Childs *v.* Smith, 1 Md. Ch. Dec. 483; Cook *v.* Cook, 11 Gray, 123.

[5] Crockett *v.* Crockett, 2 Ohio, N. s. 180. See also Padelford *v.* Padelford, 7 Pick. 152; Dalton *v.* Dalton, 7 Ired. Eq. 197.

[6] Lambeth *v.* Warner, 2 Jones, Eq. 165; Owen *v.* Hyde, 6 Yerg. 334; Hastings *v.* Cruncleton, 3 Yeates, 261; Findlay *v.* Smith, 6 Munf. 134; Alexander *v.* Fisher, 7 Ala. 514; 4 Kent, Com. 76.

[7] Ballentine *v.* Poyner, 2 Hayw. 110 (Martin & Hayw. 268).

poles,[1] under the circumstances above supposed would not be waste.

§ 489. **Where Land assigned in Different Parcels.** — Where the entire dower lands set off to a widow consist of different parcels of the same original estate, but the rights of reversion in different parcels are in different persons, her right of cutting upon any one of them is not thereby affected, if she fairly treat it as one estate and is not guilty of partiality or malice towards any one of the reversioners.[2]

INDEX DIGEST OF THE PRINCIPAL STATUTES OF THE VARIOUS STATES AND TERRITORIES RESPECTING THE RIGHTS (OTHER THAN HOMESTEAD) OF MARRIED WOMEN IN THE REAL PROPERTY OF THEIR HUSBANDS.

Alabama. — Civil Code 1896. Life estate in legal and equitable estates of inheritance, of which husband is seised at death. § 1504. If estate solvent, and no lineal descendants, one half; if insolvent, one third. If lineal descendants, one third. § 1505. If widow has separate estate equal to dower interest and distributive share, estimating dower as seven years' rent of the dower lands, she is not entitled to either dower or distributive share. § 1506. If her separate estate be smaller than covered by preceding section, she will be allowed so much as with her separate estate would be equal to dower and distributive share. § 1507. Divorce *a vinculo* bars dower. § 1508. Court of probate may appoint commissioner to relinquish dower of insane wife. § 1511. But not after husband's death. Clancy v. Stephens, 92 Ala. 577; s. c. 9 So. Rep. 522, 524. If lands were aliened by husband, and by reason of improvements made by alienee or otherwise, assignment by metes and bounds would be unjust, application must be made to court of chancery. § 1525. In such case, widow is dowable of value of land at time of alienation, one third interest thereof to be paid annually, secured if necessary by lien on land, unless compensation in gross agreed to. § 1526. Action against alienee barred in three years from husband's death. § 1528. As against heirs, action barred presumptively in twenty years. Graves *v.* McDade, 108 Ala. 420; s. c. 19 So. Rep. 86. Wife, if eighteen years old, may relinquish by joining with husband either in his deed or in power of attorney authorizing conveyance; or by a separate instrument. In either case her signature must be witnessed and acknowledged as provided by the Code. § 1509.

Alaska. 23 U. S. Stat. at Large, 24; Hill's Ann. Laws of Oregon, 1887. General Laws of Oregon in force on May 17, 1884, are made the law of Alaska. Dower as at common law. § 2954 (Or.). No dower in an equity. Whiteaker *v.* Vanschoiack, 5 Or. 113. Dower secured in surplus realized upon sale of land after

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[1] Clemence *v.* Steere, 1 R. I. 272.

[2] Padelford *v.* Padelford, 7 Pick. 152; Dalton & Dalton, 7 Ired. Eq. 197.

husband's death upon foreclosure of a mortgage by the husband in which wife joined. §§ 2958, 2959. Dower in lands aliened by husband which have enhanced in value, estimated according to value at time of alienation. § 2960. Wife may relinquish dower by joining in husband's deed and acknowledging same. § 2966. Barred by legal or equitable jointure. The wife's assent, if she be of age, to be expressed by her becoming a party to the deed of settlement; or, if she be under age, by her father or guardian joining in the conveyance. §§ 2967–2969. If such jointure be made without the consent of the intended wife, she may elect between dower and jointure within one year after husband's death. Failing an election, she takes only dower. § 2970. Aliens not barred. § 2974. Quarantine for one year and a reasonable sustenance out of the estate for same period. § 2976.

Arizona. Rev. Stat. 1887. No dower. Widow takes by descent a life estate in one third of the land of deceased husband as to which he died intestate, if the deceased left a child, children, or their descendants; but if there be no child, children, or their descendants, the wife is entitled to one half the lands of the intestate in fee-simple. § 1460.

Arkansas. Digest (1894). As at common law. § 2520. In equitable estates. Hewitt *v.* Cox, 25 Ark. 225; s. c. 15 S. W. Rep. 1026; 17 S. W. Rep. 873. Alien has same right as citizen. § 2521. Having joined in husband's mortgage, not entitled to exoneration out of personal estate. Hewitt *v.* Cox, *supra.* If lands exchanged, may elect dower out of either within one year from death of husband; failing election, dower to be assigned out of land received in exchange. § 2522. Dower in surplus after foreclosure after husband's death. § 2525. Barred by divorce *a vinculo* for wife's misconduct. § 2527. Jointure, how erected. §§ 2528–9. Jointure assented to, a bar. § 2530. Jointure unassented to puts widow to election. § 2531. May elect between dower and testamentary provision in lieu. § 2532. Election must be made in one year from death of husband or dower barred. § 2533. Jointure forfeited where she would have forfeited dower. § 2534. Quarantine, two months in the mansion after husband's death and until assignment, with the farm; and two months' sustenance out of the estate. §§ 2536–7. Trimble *v.* James, 40 Ark. 393; Mock *v.* Pleasants, 34 Ark. 63. If assignment cannot be made, land may be sold. § 2540. If no children, widow dowable in fee-simple of one half real estate, being new acquisition, of which husband died seised, as against collateral heirs; but of one third as against creditors. If the estate be ancestral, she will take life interest in one half as against collateral heirs, one third as against creditors. § 2542. Action for dower not barred by limitation in favor of heirs. McWhirter *v.* Roberts, 40 Ark. 283. Action barred in seven years in favor of strangers. Wife may relinquish by joining with husband in his deed and acknowledging same. § 706. By attorney in fact. § 4941.

California. Deering's Civ. Code 1899. No dower. § 173. Widow takes as heir. In real property as to which a husband dies intestate, if there be only one child or the lawful issue of one child surviving, the widow takes one half interest; if more than one child, or one child and lawful issue of one or more deceased children surviving, widow takes one third (statute is defective in leaving to implication the case of a man dying leaving no children living but the descendants of more than one deceased child). If decedent leave no issue, wife takes half, if there also survive decedent's father, mother, sister, brother, or the children of any deceased sister or brother. Failing issue and all of the afore-mentioned relatives, surviving wife inherits the whole estate. § 1386.

Colorado. Mills' Ann. Stat. 1891. No dower. Widow takes as heir. In real

property as to which husband dies intestate, widow takes a one half interest if the decedent leave children or the descendants of children him surviving. If no issue survive, the widow inherits the entire estate. § 1524.

Connecticut. Gen. Stat. 1888. Woman married prior to April 20, 1877, living with husband at time of his death, or absent by his consent, or by his default, or by accident, or who has been divorced without alimony, where she is the innocent party, takes dower in the real estate of which her husband died possessed in his own right, unless suitable provision by jointure was made before marriage; or a settlement of property was made in her favor, in contemplation of marriage, to take effect after death of intended husband, and expressed to be in lieu of dower; or unless husband and wife, during marriage, have entered into, and caused to be recorded, a written contract with each other for the mutual abandonment of all rights of either in the property of the other at common law, or under the statutes in force at the time of their marriage, and for the acceptance of the provisions of the statutes relating to persons married on or after April 20, 1877. Woman married on or after April 20, 1877, takes, subject to debts and charges against decedent's estate, a life estate in one third in value of all the real property, legal or equitable, owned by husband at time of death. This right cannot be defeated by any disposition by will to other parties. If there be no will, widow takes such third absolutely. If there be no children or representatives of children, the wife takes one half absolutely instead of one third. Barred by any written contract, made before or during marriage, by which the wife received from the husband what was intended as a provision in lieu of such statutory share; or by an abandonment, without sufficient cause, which has continued to husband's death. §§ 618–625.

Delaware. Revised Code 1893. Dower, a life estate in one third, or, if the husband die intestate and without issue surviving, in one half, of the lands and tenements whereof husband died seised. Barred by acceptance by agreement, before marriage, and in contemplation of marriage, the woman being twenty-one years old, of an estate in, or a charge upon, real estate to take effect at or before death of intended husband and to continue during her life, in lieu of dower. Husband's devise presumed to be in lieu of dower and bars, unless widow elect to take dower. Forfeited by willingly leaving husband and going with adulterer, or willingly living in adultery in a state of separation from husband not occasioned by his fault, unless husband be reconciled to her and suffer her to dwell with him. The action of dower survives. Demandant recovers reasonable damages which are in satisfaction of any demand for rents and profits. Chaps. 85, 87. Relinquished by joining in her husband's deed; such deed operating as a special warranty against herself and heirs. Such deed must be separately acknowledged by her. Wife may relinquish dower by her conveyance, in which her husband does not join, in case of sale of land under judgment, or by trustees of idiots, lunatics, or persons of unsound mind. May make a letter of attorney as if a *feme sole*. Chap. 83.

District of Columbia. Comp. Stat. 1894. Dower, its incidents and the remedies therefor are as at common law, modified by the English statutes, as laid down in the text. Devise by the husband presumed in lieu of dower, but widow may elect within ninety days after probate of will. If the devise be of realty and personalty, she must renounce the whole or be barred of dower. Chap. 1, §§ 157 *et seq.* In decreeing divorce, court has discretionary power to retain right of dower. In case of adultery of wife after judgment of divorce from bed and board, court may rescind right of dower. Chap. 30, §§ 41, 45. May relinquish dower by joining in husband's deed and making a separate acknowledgment, or by her sole deed separately

acknowledged. Chap. 58, §§ 12–14. In case of sale of intestate's realty upon partition, widow may consent and bar dower, receiving such proportion of purchase-money as court shall deem equitable, not less than one tenth nor more than one seventh according to her age, health, and condition. Chap. 51, § 11. The value of dower in lands aliened by husband is to be taken as of the time of valuation, deducting increase arising from labor and money of purchaser. McKenny *v.* Young, 7 Mackey, 268.

Florida. Rev. Stat. 1892. As at common law. Quarantine, until dower assigned. Devise of husband in lieu of dower a bar unless she dissent within one year from probate of will. If husband die intestate within this State, widow may take the whole estate, or dower, if there are no children. In all cases she may elect between a child's part and dower. §§ 1830–1833. The provision that the widow may elect the whole estate or dower, in certain cases, is in conflict with § 1820, which, in the event of the husband's death without issue, makes the widow his sole heir. Barred by elopement and adultery. Henderson *v.* Chaires, 25 Fla. 26; s. c. 6 So. Rep. 164. Relinquished by wife joining in husband's deed or by sole deed, and separate acknowledgment. § 1957. By power of attorney. § 1967. Proceedings for relinquishment of dower of insane married women. § 1960. Whether an action for admeasurement of dower is barred by the statute of limitations, query. Branch *v.* Cole, 18 Fla. 368.

Georgia. Code 1895. Estate for life in one third the lands, according to valuation, including dwelling-house (which is not to be valued unless in a town or city), of which husband was seised at time of death, or to which he obtained title in right of wife. § 4687. Sale under judgment in husband's lifetime bars. But if judgment creditor delay until husband's death, judgment lien is postponed to dower. Simmons *v.* Latimer, 37 Ga. 490. Assigned in lands held under deed, bond for title, or other instrument having like effect, where portion of purchase-money has been paid, subject to unpaid purchase-money where vendee held under bond for title or other like instrument, or gave purchase-money mortgage contemporaneously with execution of deed. § 4688. Barred by provisions made prior to marriage and accepted by wife in lieu of dower; by provision, by will or deed, accepted by wife after husband's death, expressly in lieu of dower, or where intention of husband plain and manifest that it shall be in lieu of dower; by election within one year from grant of letters on husband's estate, to take child's part in lieu of dower; by failure to apply within seven years from husband's death; by joining in husband's deed to lands to which title came through her; by her adultery unpardoned by husband. § 4689. Not barred by wife's acceptance, during husband's life, of deed to land in lieu of dower. Butts *v.* Trice, 69 Ga. 74. Not necessary for wife to join in husband's deed, to bar dower, unless title came through her. Andrews *v.* The Atlanta Real Estate Co., 92 Ga. 260; s. c. 18 S. E. Rep. 548. Quarantine, until dower assigned. § 4693. Lien created by husband, though assented to by wife, no bar. § 4694. With assent of executor or administrator, widow may elect life estate in one third proceeds of sales of land or any distinct tract in lieu of dower. § 4695. Or with such assent and approval of ordinary, may elect sum of money to belong to her absolutely, to be determined by commissioners to assign dower. § 4696.

Idaho. Rev. Stat. 1887. No dower. § 2506. Widow takes as heir of intestate husband: if no issue, or if one child or issue of one child survive, one half; if more than one child or one child and issue of one or more deceased children survive, one third.

Illinois. Rev. Stat. 1899. "Wife shall be endowed of the one third part of all the lands whereof the deceased husband was seised of an estate of inheritance, at any time during marriage, unless the same shall have been relinquished in legal form." Equitable estates included. Chap. 41, § 1. Aliens entitled. § 2. Barred by jointure before marriage assented to by intended wife, if of age, joining in deed; or, if a minor, by father or guardian joining in deed. Jointure after marriage, or unassented to before marriage, puts widow to election. Any testamentary provision of husband, unless otherwise expressed in will, bars dower unless widow renounce benefit of such provision. Deemed to have elected jointure or provisions of will unless renunciation made within one year after letters. If husband die testate leaving no issue, widow may elect in lieu of dower in estate of which he died seised (whether such right accrued by renunciation or otherwise), absolutely, one half of the realty remaining after payment of debts. Such election may be made after dower assigned and within two months after notification to widow of payment of debts, and not after. §§ 7–13. Barred by divorce through her fault; otherwise, if through his. Barred by abandonment and adultery unless parties become reconciled and dwell together afterwards. §§ 14, 15. Dower relinquished by wife if eighteen years of age, joining in husband's conveyance or power of attorney; or, where husband's title has been divested, by sole deed duly executed and acknowledged. §§ 17, 18. Acknowledgments taken as if she were *feme sole*. § 19.

Indian Territory. Same as Arkansas. 26 U. S. Stat. at Large, chap. 182, § 31.

Indiana. Rev. Stat. 1894. Dower abolished. Husband dying testate or intestate, wife inherits one third in fee-simple free from all demands of creditors; provided, if real estate exceeds $10,000 in value she shall have one fourth only; if it exceeds $20,000, one fifth only, as against creditors. § 6440. Husband dying intestate leaving only one child, one half descends to widow. § 2643. Collins *v.* Collins, 126 Ind. 559; s. c. 25 N. E. Rep. 704. If husband die intestate, leaving no child but leaving father or mother, widow takes three fourths; but in such case, if the entire amount of realty and personalty do not exceed $1,000 the whole goes to the widow. § 2650. And if husband die leaving neither child nor father nor mother, the whole goes to the widow. § 2651. Surviving wife is entitled, except as in § 6440, *supra*, to one third of all the real estate of which her husband was seised in fee-simple at any time during marriage, and in the conveyance of which she may not have joined in due form of law, also of all lands in which her husband had an equitable interest at the time of his death; provided, that if the husband shall have left a will, the wife may elect to take under the will instead of this or the foregoing provisions. § 6452. Under this section, widow is not affected by secret trusts of which she had no notice. Richardson *v.* Schulz, 98 Ind. 429. Otherwise as to land taken under § 6440. Deery *v.* Deery, 74 Ind. 560. Use of dwelling-house and fields adjacent, not exceeding forty acres, for one year from husband's death. § 2653. Inheritance barred by abandonment and living in adultery at time of husband's death. § 2657. Or by jointure before marriage. § 2661.

Iowa. Code 1897. One third in value of all the legal or equitable estates in real property possessed by the husband at any time during marriage, which have not been sold on execution or judicial sale, and to which the wife had made no relinquishment, shall be set apart as her property in fee-simple. § 3366. Not subject to decedent's debts. Kendall *v.* Kendall, 42 Iowa, 464. If decedent leave no issue, one half shall go to the wife. § 3379. If heirs are not found, uninherited portion goes to wife. § 3382. Divorce a bar. Boyles *v.* Latham, 61 Iowa, 174;

s. c. 16 N. W. Rep. 68. But not an adulterous elopement. Smith *v.* Woodward, 4 Dillon, 584. May be waived by antenuptial contract. Jacobs *v.* Jacobs, 42 Iowa, 600. Widow may accept provisions of will in lieu of distributive share. § 3376. Or may elect homestead. § 3377. Relinquishment by joining in husband's deed. § 2920. Acknowledgment not necessary to validity. Simms *v.* Hervey, 19 Iowa, 273. Dower cannot be the subject of agreement between husband and wife. § 3154. Linton *v.* Crosby, 54 Iowa, 478.

Kansas. Gen. Stat. 1897. No dower. In addition to homestead rights, widow takes by descent, subject to payment of debts, one half in value of all the real estate in which the husband, at any time during marriage, had a legal or equitable interest, which has not been sold on execution or judicial sale, and of which the wife has made no conveyance. But a wife, who, at the time of her husband's conveyance, is not, or never has been, a resident of this State takes nothing of the land so conveyed. Chap. 109, § 8. Failing issue, decedent's remaining estate, undisposed of by will, goes to his widow. § 19. Parties contemplating marriage may, by contract fairly entered into, provide a different rule from the one prescribed by statute, for settling their property rights. Green *v.* Green, 34 Kan. 743 ; s. c. 10 Pac. Rep. 156 ; Hafer *v.* Hafer, 33 Kan. 449 ; s. c. 6 Pac. Rep. 537.

Kentucky. Statutes 1894. Life estate in one third of all real estate, legal and equitable, of which husband was seised in fee-simple during coverture. § 2132. Homestead must be estimated in allotting dower. If it exceeds dower in value, it bars. Sansbury *v.* Simms, 79 Ky. 527. If wife voluntarily leave husband and live in adultery, dower barred unless reconciliation and cohabitation. § 2133. Conveyance or devise of real or personal estate by way of jointure may bar ; but if made before marriage without her consent, or during infancy, or after marriage, she may, within twelve months after her husband's death, waive jointure and take dower. § 2136. Divorce *a vinculo* a bar. § 2144. Dower interest of insane wife sold on petition of husband. § 2145. Until dower assigned, wife entitled to one third of the rents and profits of her husband's dowable real estate from his death ; together with mansion-house, yard, garden, stable and its lot, and adjoining orchard. § 2138. Wife not endowed of land sold but not conveyed by the husband before marriage, nor of land sold after marriage to satisfy incumbrance created before, or by deed in which she joined, or to satisfy lien for purchase-money; but she may have dower out of the surplus unless it was received and disposed of by husband in his lifetime. § 2135. Action to recover dower barred in fifteen years from husband's death. Anderson *v.* Sterritt, 79 Ky. 499; Williams *v.* Williams, 89 Ky. 381 ; s. c. 12 S. W. Rep. 670. Relinquished by wife joining in husband's deed, or by wife's sole deed subsequent to husband's conveyance. §§ 505, 506. See Shinkle's Assignee *v.* Bristow, 95 Ky. 85 ; s. c. 23 S. W. Rep. 670. Separate acknowledgment necessary. § 507.

Louisiana. 1 Merrick's Rev. Civ. Code, 1900. If a married man has left no lawful descendants, ascendants, or any collateral relations, but a surviving wife not separated from bed, the wife shall inherit. Art. 924. In all cases, if the husband die, leaving no ascendants or descendants, without having disposed by will of his share in the community property, such share shall be held by the widow in usufruct during her natural life. And in all cases where the predeceased husband shall have left issue of the marriage with the survivor, and shall not have disposed by will of his share in the community property, the widow shall hold in usufruct, during her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. But this usufruct ceases

if the widow contract a second marriage. Arts. 915, 916. Separation from bed and board carries with it not only a separation of property, but a dissolution of the community acquets and gains. Art. 123. Married woman, above the age of twenty-one years, has the right, with the consent of her husband, to renounce her matrimonial and other rights in favor of third persons, by act passed before a notary public. Art. 129. Divorce has the same effect as separation from bed and board.

Maine. Statutes (Freeman's Supplement, 1885–1895). By act taking effect May 1, 1895, except as to persons then married and as to such persons, Jan. 1, 1897, dower was abolished. Real estate of intestate, subject to payment of debts, including a wood-lot or other land used with the farm or dwelling-house, although not cleared, but excepting wild lands of which he dies seised and wild lands conveyed by him, descends, if he leaves a widow and issue, one third to the widow. If no issue, one half to the widow. If no kindred, the whole to the widow. Wife may bar right of descent in real estate conveyed by husband by joining in the same or a subsequent deed, or by sole deed. Levy or sale on execution no bar; but after expiration of right of redemption, she may renounce by sole deed. Barred by jointure, pecuniary provisions, or an antenuptial settlement as dower could be barred according to provisions of chap. 103 of R. S. Election between specific provisions of husband's will and right by descent, but not entitled to both. If husband wishes to sell and wife refuses to renounce right of descent, justice of supreme judicial or superior court may approve sale and order paid to clerk of court, for wife, such sum as would amount to one third price if owner has issue ; one half if no issue, at expiration of owner's expectancy of life, computed at three per cent compound interest. Chap. 75.

Maryland. Pub. Gen. Laws, 1888. As at common law. With consent of widow, court may order land sold free from dower and allow widow from one seventh to one tenth net proceeds according to her health, age, and condition. In partition, land may be sold free from dower right of wife of any party. pp. 145, 146. Dower in lands held by equitable title in husband — but not to prejudice any claim for purchase-money or other lien. p. 802. Forfeited by bigamy. p. 464. Relinquished by joint deed of husband and wife, or by her sole deed. Separate acknowledgment not required. p. 804. Devise or bequest to wife of testator in lieu of dower unless otherwise expressed. Such will bars dower unless, within six months after the first grant of administration upon husband's estate, widow renounce claim under will and claim dower. Devise of part of the realty or bequest of part of personalty only bars her of rights by marriage in realty or personalty, as case may require ; but if the devise of realty or bequest of personalty, or both, be expressly in lieu of her legal share of one or both, she shall accordingly be barred unless she renounce as aforesaid. Inoperative devise shall not bar, whether or no. Acceptance of devise in lieu, makes her purchaser for fair consideration. Jointure or other settlement by husband before marriage bars ; yet she may accept testamentary provision. pp. 1410, 1411. Wife declared insane, husband may convey land free from dower. Act of 1896, chap. 243.

Massachusetts. Public Stat. 1882. As at common law. Husband dying intestate without issue, widow takes his real estate in fee to an amount not exceeding $500 in value and life estate in one half other real estate of which he died seised ; or, if she elect within six months of grant of administration, she may, instead of such life estate, have dower in his real estate other than that taken by her in fee. Husband dying intestate leaving no kindred, widow takes whole of real estate in fee. Quar-

antine, forty days. No dower in wild lands of which husband dies seised, except wood-lots or other land used with his farm or dwelling-house; nor in such lands conveyed by him though afterwards cleared. Provision for dower in mortgaged land. Relinquishment by wife joining in deed of conveyance or by sole deed. Chap. 124. By joining in conveyance of husband's guardian. Guardian of insane wife may release under order of court; provision secured to wife out of proceeds of sale. Land settled in trust without power of revocation for benefit of insane wife, trustee may pass title free from dower, under order of probate court. Chap. 147. Barred by jointure assented to before marriage, if of a freehold estate in lands for her life at least, to take effect in possession or profit immediately on husband's death; she being a party to the deed if of age; if not, she and her father or guardian joining in conveyance. Jointure after marriage, or before without intended wife's consent, bars dower unless she waive jointure and elect dower within six months after husband's death. Action barred in twenty years from husband's death (with saving clauses). Chap. 124. Divorce bars, except when for adultery committed by husband, or because of his sentence to confinement at hard labor, in which cases she has dower as if he were dead; and except when, on decree *nisi* on wife's libel, he dies before decree made absolute. Chap. 146. Not cut off by execution against husband or his administrator. Chap. 172.

Michigan. Howell's Ann. Stat. 1882. As at common law, unless lawfully barred. Lands exchanged, widow may elect; failing election, dower in land received in exchange. In land mortgaged before marriage, except as against mortgagee and assigns. Idem as to purchase-money mortgage given during coverture, wife not joining. If land sold under foreclosure after husband's death, wife not being entitled to dower as against mortgagee, dower allowed out of surplus — interest on one third. In land aliened by husband, dower assigned according to value at time of alienation. Assigned of rents when cannot be assigned by metes and bounds. Relinquished by joining in conveyance of husband or his guardian or by joining with husband in subsequent deed, or by her sole deed to one who has acquired and holds husband's title. Expression in deed of intent to bar dower, and acknowledgment (not separate) necessary (see § 5662). Barred by jointure before marriage, she, and, if she be a minor, her father or guardian, joining in conveyance. Barred by any pecuniary provision in lieu of dower so made and assented to. Such jointure or provision made without such assent, or after marriage, puts her to election after husband's death. Testamentary provision by husband in lieu of dower puts her to election. Failing election within one year from husband's death, deemed to have elected jointure, devise, or other provision. Aliens entitled; but non-residents entitled only in lands of which husband died seised. Quarantine, one year. Proceedings to bar dower of insane married woman. §§ 5733–5768. If husband die intestate, without issue, widow may take, in lieu of dower, and subject to payment of debts, one half of the lands, tenements, and hereditaments, and any rights thereto and interests therein, of which the husband was seised in fee-simple at death, and estates *per auter vie* of which he was seised at death. Supplement, 1890, § 5772 *a*.

Minnesota. Gen. Stat. 1891. Dower abolished. Lands, tenements, hereditaments, rights thereto, and interests therein in fee-simple or for the life of another, descend, if a homestead, free from testamentary or other disposition to which wife shall not have assented in writing, and claims against deceased's estate, if no surviving issue, to surviving wife; if issue, to surviving wife for life. Surviving wife entitled in fee-simple or by such inferior terms as deceased was at any time during

coverture seised or possessed of to one third all other lands of which husband was seised or possessed during coverture, free from testamentary or other disposition to which wife has not assented in writing, but subject, in its just proportion with the other real estate, to payment of such debts as are not paid out of personal estate. Parent dying testate making provision for widow in lieu of statutory share, widow must, within six months from probate of will, elect to take statutory share, or be confined to such provision. §§ 5675–5682. Wife joining in husband's deed must be described as his wife in the acknowledgment, otherwise acknowledgment as if she were *feme sole*. § 4293.

Mississippi. Ann. Code 1892. Married women fully emancipated and dower abolished. §§ 2289–2290. Subject to payment of debts, deceased husband's entire intestate estate, if no issue, descends to surviving wife in fee-simple; if issue, widow takes child's part in fee-simple. § 1545. Divorce *a vinculo* causes marital right to cease. § 1563.

Missouri. Rev. Stat. 1899. As at common law, and in equitable estates, and in leasehold estates for twenty years or more. § 2933. Subject to purchase-money liens. § 2936. Husband dying without surviving issue capable of inheriting, widow to take all the realty which came to husband in right of marriage, remaining undisposed of, not subject to payment of debts; and one half realty belonging to husband at death, subject to debts. § 2939. Widow entitled under last section must, within twelve months from grant of letters, elect to take thereunder, or she is remitted to dower as in §§ 2933, 2936. Husband leaving issue, if widow have a child by such husband living, she may elect to take absolutely a child's part, subject to debts. Election must be made within fifteen months from grant of letters or she will be confined to dower as above. §§ 2944, 2945. No act of husband or judgment against him a bar without assent of wife, evidenced by her acknowledgment. § 2946. Divorce for her misconduct a bar. § 2947. Husband's devise presumed in lieu; but she may renounce under will and claim dower within twelve months after proof of will. Antenuptial jointure a bar, unless intended wife a minor. Jointure to a minor or made after marriage may be renounced by widow claiming dower. §§ 2950, 2951. Leaving husband voluntarily and continuing with adulterer, or consenting to ravisher after being ravished, a bar. § 2953. Quarantine, until dower assigned. § 2954. Proceedings by husband of insane wife in order to sell land free from dower right. § 2985.

Montana. Codes and Stat. 1895. One third part of all lands whereof husband seised of estate of inheritance at any time during marriage, unless relinquished in legal form. Relinquishment by joining with husband in any conveyance; except that where she joins in execution of mortgage, she shall have dower in surplus. Equitable estates and all real estates contracted for by husband, title to which completed after his death, subject to dower. Civil Code, § 228. Widow always entitled except as against mortgagee. § 229. But not if mortgage given for purchase-money. § 230. Resident married man's sole deed bars right of wife who has never been in State or Territory of Montana. § 233. Barred by devise or bequest (unless otherwise expressed), unless she renounce and elect dower within one year after probate. § 235. Husband dying, wife but no issue surviving, she may elect, in lieu of dower in the estate of which husband died seised, absolutely, one half of all real estate remaining after payment of debts; election to be made within two months after notification of payment of debts. § 236. Election in case of exchanged lands. § 237. Lands aliened by husband, dower estimated according to value at time of alienation. § 238. Barred by jointure with her assent before marriage.

§ 239. Right not prejudiced by any act or conveyance of, or judgment against, husband. § 243. Further provisions for widow taking by succession where husband dies leaving no issue, or one child or its issue, or more than one child or their issue. In this connection there is no express requirement of an election between succession rights and dower right. Civil Code, § 1850 *et seq.*

Nebraska. Comp. Stat. 1899. As at common law. § 2514. Election in case of exchanged lands. § 2515. Lands mortgaged before marriage, right in, as against all but mortgagee. § 2516. Lands bought during marriage, mortgaged for purchase-money, wife not joining, no right as against mortgagee, but as against all others. § 2517. Dower in surplus when land sold under aforesaid mortgages. § 2518. Lands aliened by husband, dower estimated as of value at time of alienation. § 2520. Barred by wife joining in husband's, or his guardian's conveyance, or by joining with husband in subsequent conveyance and acknowledging. § 2525. Barred by jointure before marriage assented to by her, or, if a minor, by her and her father or guardian joining in the conveyance. § 2527. Barred by any provision for intended wife, in lieu of dower, so assented to. § 2528. Election, when provision made before marriage without such assent, or made after marriage. § 2529. Election between testamentary provision or jointure in lieu of dower, and dower, to be made within one year from husband's death, or confined to such jointure or other provision. §§ 2530, 2531. Aliens not barred. Non-resident women entitled to dower in lands of which husband died seised. § 2533. Widow who was living with husband at his death and who does not own in her own right residence suitable to condition in life may remain in dwelling-house of husband as long as she remains a widow. § 2535. Further provisions for widow taking by descent in case her husband dies leaving no issue or no kindred; but such provisions do not affect the title of the widow as tenant in dower. § 3545 *et seq.* If marriage dissolved by husband's sentence to life imprisonment, or if divorce decreed by husband's adultery, misconduct, or drunkenness, or his sentence to three years' imprisonment or more, wife entitled to dower as if he were dead. Not entitled to dower in other cases of divorce. § 2879.

New Hampshire. Pub. Stat. 1891. Dower in the real estate of which husband died seised; but not in any lands which were not, during marriage and seisin of husband, in state of cultivation, or used or kept as wood or timber lot, and occupied with some farm or tenement owned by husband. Widow endowed of so much of any of husband's real estate as will produce yearly income equal to one third of yearly income thereof at time husband died *or parted with his title.* Dower not conveniently assignable, widow to be endowed in special manner. Quarantine, forty days, and one third rents of estate until assignment of dower. By renouncing dower and will in her favor, widow may take in fee of the real estate of which husband died seised, after payment of debts, etc., one third, if he leave issue by her surviving; one half, no issue whatever surviving. Renunciation to be made within one year from husband's death. Antenuptial settlement by stipulation in lieu of dower, distributive share, or either, bars. Devise of husband presumed in lieu of dower, unless contrary intention apparent. p. 516 *et seq.* Relinquishment by wife, although not of full age, joining in husband's conveyance. Proceedings by husband of insane wife, to sell land free from dower right. p. 499.

New Jersey. Gen. Stat. 1709–1895. As at common law, and in equitable estates. Quarantine, until dower assigned. p. 1275. Jointure a bar; but if made before marriage during infancy of *feme,* or after marriage, widow may waive and demand dower. Wife voluntarily leaving husband and going away and continuing

with adulterer, bars, unless husband be voluntarily reconciled and suffer her to dwell with him. Devise to wife, not otherwise expressed, presumed in lieu of dower, and a bar, unless she renounce under will and claim dower within six months after probate. p. 1277 *et seq.* Proceedings to release dower of insane wife. p. 1281. In certain cases in discretion of court, decree of divorce *a mensa* may bar dower. p. 1275. Gross sum awarded in lieu of dower, by consent, in foreclosure. p. 401. Released by joining in husband's deed and making separate acknowledgment, if she be twenty-one years old. By letter of attorney in which husband joins. p. 854. Wife of infant may release by sole deed. p. 1713. Released by wife's sole deed, when husband's estate has already been conveyed. p. 2017.

New Mexico. Comp. Laws 1897. No dower. Surviving wife takes absolutely one half of the acquest property remaining after payment of common debts of marriage. § 2030. Of remainder of acquest property, subject to deductions, debts, etc., surviving wife, in absence of will, takes one fourth, and takes the remainder in equal shares with decedent's children. § 2031. Intestate leaving no issue, entire estate goes to surviving wife. § 2033.

New York. Rev. Stat. 1896. As at common law. Alien entitled, if inhabitant of this State at husband's death. Lands exchanged, widow may elect within one year from death of husband; failing election, dower in land received. In lands mortgaged before marriage, as against every person but mortgagee and those claiming under him. Purchase-money mortgage executed during coverture, wife not joining, no dower as against mortgagee and those claiming under him. In such cases, land being sold under foreclosure after husband's death, widow endowed of surplus — income of one third for life. Barred by divorce *a vinculo* for misconduct of wife. Barred by jointure before marriage, assented to by intended wife joining in the conveyance in which, if she be under age, her father or guardian must also join. Barred by any pecuniary provision made and assented to as above. Jointure or provision in lieu of dower, made after marriage, or before marriage, but not assented to; or testamentary provision in lieu, puts widow to election within one year from husband's death. Failing election, dower barred. Any provision in lieu of dower forfeited in the same cases in which dower would be forfeited. Right not affected by acts of husband or by judgment against him. Quarantine forty days. p. 1814 *et seq.* No express provision for a wife releasing dower by joining in husband's deed. Inferentially, however, this is provided for. See Elmendorf *v.* Lockwood, 57 N. Y. 322. Release by power of attorney, p. 2929.

North Carolina. Code 1883. As at common law. Barred if wife commit adultery and shall not be living with husband at his death. Right includes all legal rights and equities of redemption or other equitable estates, subject to valid incumbrances created before marriage or during it with her free consent lawfully appearing thereto. Not subject to seizure on execution for husband's debts. Same true of lands devised in lieu, if they do not exceed in quantity what she would be entitled to by right of dower. Purchase-money mortgage executed by husband alone bars. Barred by wife joining in husband's deed and being privily examined. Barred by husband's testamentary provision in lieu unless she, or, if she be infant or insane, her guardian, dissent within six months after probate. § 2102 *et seq.* Forfeited by murder of husband. Laws of 1889, chap. 499. Barred by divorce *a vinculo*, and if she elope with adulterer and be not living with husband at his death. §§ 1843, 1844. Estates *per auter vie* undevised are deemed inheritances, and if any person die leaving none who can claim as heir to him, his widow shall be deemed his heir and as such shall inherit his estate. § 2181.

North Dakota. Rev. Code 1895. Dower abolished. §§ 2770, 3743. Husband, having title to any estate not limited by marriage contract, dying intestate, surviving wife takes by succession, subject to administration, if only one child or lawful issue of one child surviving, in equal shares with such child or issue; if more than one child living, or one child and lawful issue of one or more deceased children, one third; if decedent leave no issue and estate does not exceed $5,000 in value, the wife takes it all, and all property in excess of $5,000 goes, one half to surviving wife. §§ 3740 *et seq.* Judgment of divorce restores wife to state of unmarried person. § 2736. For purposes of descent the property of deceased is not divided into real and personal.

Ohio. Rev. Stat. 1891. As at common law, and one third of all real property of which husband, at death, held the fee-simple in reversion or remainder, and one third of all the title or interest that deceased had at death in any real property held by article, bond, or other evidence of claim. Quarantine, one year, if dower not sooner assigned. § 4188. Barred by conveyance of estate in real property if accepted; but if made during minority of grantee or during marriage, grantee may waive, and demand dower. § 4189. Barred if wife leaves husband and dwells in adultery, unless condonation. § 4192. Forfeited by commission of waste. § 4194. Not barred by divorce when granted for husband's aggression. § 5699. Otherwise a bar. § 5700. Barred by election to take under husband's will, made within six months after probate. § 5964. Stilley *v.* Folger, 14 Ohio, 610. Provision for such election being made for insane widow. § 5966. Provision for releasing dower of insane wife. § 5725. Released by joining in husband's deed to be executed by her as if she were *feme sole.* §§ 4106, 4107; Gregory *v.* Gregory, 16 Ohio St. 560. Widow entitled to inherit from husband in certain cases. § 4158 *et seq.*

Oklahoma. Stat. 1893. Dower abolished. §§ 2972, 6262. During coverture, wife has inchoate right of inheritance. Husband's conveyances are subject to such right unless wife join therein. § 1629. Husband dying intestate, entire estate, real and personal, not otherwise limited by marriage contract is distributed, subject to payment of debts: If only one child or its issue surviving, one half to widow; if more than one child living or one child living and lawful issue of one or more deceased children, one third to the widow; if no surviving issue, one half to widow; if no surviving issue, father, mother, brother, or sister, the whole to the widow. § 6261.

Oregon. Hill's Ann. Laws 1887. As at common law. § 2954. Lands exchanged, widow must elect within one year from husband's death or be confined to lands received. § 2955. Lands mortgaged before marriage, widow entitled as against all but mortgagee and those claiming under. § 2956. Widow not entitled as against purchase-money mortgagee and claimants under, although she did not unite in such mortgage executed during coverture. § 2957. In either foregoing cases or in case of a mortgage in which she shall have joined, she shall have dower out of the surplus upon foreclosure sale caused after husband's death. § 2958. Lands aliened by husband and enhanced in value, dower estimated according to value at time of alienation. § 2960. Dower not assignable by metes and bounds, may be assigned of the rents and profits. § 2964. Relinquished by joining in deed of husband or his guardian, or by joining with husband in subsequent deed. § 2966. Separate acknowledgment necessary if she is a resident of the State. § 3015. Otherwise if she is a non-resident. § 3016. Barred by jointure or any pecuniary provision in lieu, made with her assent before marriage, such assent to be evidenced

by her, and, if she be under age, her father or guardian, joining in the conveyance. Such jointure or provision made for a woman before marriage without her assent, or after marriage, puts her to an election between such jointure or provision and dower. Testamentary provision in lieu, puts widow to election. In any of foregoing cases, deemed to have elected jointure, devise, or other provision, unless she begin dower proceedings within one year after husband's death. §§ 2967–2972. Quarantine, one year. § 2976. Divorce entitles party, at whose prayer decree granted, to undivided one third part in fee of the whole real estate owned by other at time of decree. § 499. An intestate leaving no lineal descendants, his wife inherits his realty, including estates *per auter vie*. § 3098.

Pennsylvania. Pepper and Lewis' Digest, 1700–1894. As at common law. See p. 1678, § 2. Barred by joint deed of husband and wife and wife's separate acknowledgment. p. 1538, § 5. Barred by sale for husband's debts or by mortgage of husband in which wife failed to join — except in cases of fraud. See quotation *infra*. In lieu of dower, widow may take as heir, subject to debts, of the real estate belonging to husband undisposed of by will: when husband leaves issue, life estate in one third ; no issue, but collateral heirs or other kindred, life estate in one half, including mansion-house. p. 1678. "By one of the earliest laws made in Pennsylvania, lands were rendered liable as chattels for the owners' debts, and, as a consequence of this, it was early decided that a sheriff's sale of the land for a debt of the husband carried the estate to the purchaser free of all claim for his wife's dower. Graff *v.* Smith's Adm'r, 1 Dall. 481. And where the husband alone mortgaged the land after marriage, and the land was sold under proceedings on the mortgage, it went to the purchaser clear of dower. Scott *v.* Crosdale, 2 Dall. 127. But where the debts were incurred or the mortgage given by the husband for the purpose of defeating the wife's dower, it is a fraud upon her, and her dower is not barred. Killinger *v.* Reidenhauer, 6 S. & R. 531; McClurg *v.* Schwartz, 87 Penn. St. 521." Mitchell's Law of Real Estate and Conveyancing in Pennsylvania.

Rhode Island. Gen. Laws 1896. As at common law. Assigned in special manner, as of one third rents, issues, growths, or profits, where not assignable by metes and bounds, and in woodlands. Forfeiture for waste. Barred by conveyance by deed or devise or bequest of any estate, real or personal, for jointure in lieu, to take effect in possession on death of husband and to continue during her life or in fee. If such conveyance made before marriage and during infancy of woman, or after marriage, she may waive jointure and claim dower within twelve months after probate or letters of administration. Chap. 264. Relinquished by wife joining in husband's deed or by her sole deed acknowledged as if she were sole. Power of attorney. Chap. 194. Upon divorce for husband's fault, wife entitled to dower as if he were dead, provided claim be made within six months after absolute decree. Chap. 195.

South Carolina. 1 Rev. Stat. 1893. No statute defining. Relinquishment by privy and separate examination and acknowledgment. Barred by acceptance of distributive share ; by wife willingly leaving husband and going away and continuing with adulterer, unless husband willingly reconcile her and suffer her to dwell with him ; by jointure, which may be refused after marriage, unless assured by act of the General Assembly. § 1899 *et seq*. There is no divorce in this State. Grant *v.* Grant, 12 S. C. 29. Mode of divesting right of dower of insane married women. § 1909 *et seq*. Husband dying intestate leaving one or more children, widow takes one third distributive share of estate ; if intestate leave no lineal descendant, father, mother, brother, or sister of the whole blood, or child of such

brother or sister, nor brother or sister of the half-blood, nor lineal ancestor — two thirds ; in all other cases, one half. § 1980 *et seq.*

South Dakota. Ann. Stat. 1899. Dower abolished. § 4591. When any person having title to any estate not otherwise limited by marriage contract dies without disposing of the estate by will, surviving wife's distributive share, subject to payment of debts is : if one child or lawful issue of one child, one half; if more than one child living, or one child living and lawful issue of one or more deceased children, one third ; if no issue, one half, unless deceased leave neither father, mother, brother, nor sister, and then, the whole. § 4590.

Tennessee. Code 1896. Life estate in one third the lands of which her husband died seised and possessed, or of which he was equitable owner. Includes lands mortgaged or conveyed in trust to pay debts if husband dies before foreclosure of mortgage or sale under deed. Widow may dissent from husband's will and have dower by dissenting in open court within one year after probate, if satisfactory provision in real or personal estate is not made for her ; but if provision in personal estate is made for her, but whole of husband's property, including bequest, taken for payment of debts, she may, without formal dissent, sue for dower. Conveyances to defeat dower, void. § 4139 *et seq.* Barred by divorce *a vinculo* at suit of husband. § 4226. Where husband dies intestate leaving no heirs-at-law capable of inheriting the real estate, it shall be inherited by the wife in fee-simple. § 4165.

Texas. Batts' Ann. Civ. Stat. 1895. Dower unknown. Where a husband dies intestate having title to any estate of inheritance, surviving wife takes by descent: if deceased leave issue, life estate in one third ; if no issue, one half in fee ; provided, that if deceased leave neither issue, father, mother, nor brother or sister or their descendants, then the widow shall be entitled to the whole. Art. 1689. Upon death of husband, all community property goes to wife if deceased leave no issue ; if issue, widow entitled to one half. Community estate passes charged with the debts against it. Arts. 1696, 1697.

Utah. Rev. Stat. 1898. Dower abolished. § 2832. One third in value of all legal or equitable estates in real property possessed by husband during coverture, to which wife has made no relinquishment of rights, goes to widow in fee-simple, free from debts, except those secured by mechanics' liens, etc., purchase-money debts, and taxes ; but no interest under this section in estates conveyed by husband when wife, at time of conveyance is not or never has been a resident of the Territory or State. § 2826. Testamentary provision construed in lieu of foregoing share unless contrary appears. Widow must elect to take under will in lieu, within four months after probate or be confined to distributive share. § 2827. Subject to debts, widow succeeds to any estate not otherwise limited by marriage contract, as to which husband dies intestate : if only one child or its issue survive, one half ; if more than one child living and issue of one or more deceased children, one third ; but shares in realty provided for in this section shall not be in addition to interest in such estates provided for in § 2826 ; if no issue, the whole if not over $5,000 in value exclusive of debts and expenses ; if over that value, $5,000 in value and one half excess ; if neither issue, father, mother, brother, nor sister, the whole. § 2828. Married man may not devise away from wife more than two thirds of real property without her consent in writing. § 2731. Upon divorce, court may make such disposition of property as is equitable. § 1212.

Vermont. Statutes 1894. Life use of one third of real estate of which husband died seised in his own right, unless barred. § 2528. In equities of redemption. § 2529 *et seq.* Barred by jointure or some pecuniary provision settled upon widow

before marriage by husband or some other person, with or without her consent, or after marriage, with her consent, to have effect after husband's death, and expressed to be in lieu of dower; by husband's testamentary provision which, in judgment of probate court, was intended to be in lieu; where husband dies without issue and widow is thereby entitled to provisions in such case provided; but widow may, in any of foregoing cases, within eight months after probate or letters granted, waive provision in lieu of dower and claim dower. Exception in certain cases where widow was not first wife of deceased. § 2532. Dower out of rents and profits where cannot be set out by metes and bounds. § 2536. Voluntary conveyance of husband to defeat dower, void as to dower. § 2541. Husband dying without issue, widow, not electing dower, entitled to whole estate if it does not exceed $2,000; exceeding that sum, to $2,000 and one half remainder; and if deceased has no kindred who by law may inherit, wife entitled to whole. § 2544.

Virginia. Code 1887. As at common law, and in equitable estates, and in rights of entry. In surplus after sale under paramount lien. Barred by any conveyance or devise of any estate, real or personal, in lieu. Every such provision presumed in lieu unless contrary intention plainly appear. But if such provision made before marriage without assent in writing, or during infancy, of *feme*, or after marriage, widow may, within one year after husband's death, or after probate of will, where provision is by will, waive provision and claim dower. Barred if wife, of her own free will, leave husband and live in adultery, unless husband afterwards reconciled to her and suffer her to live with him. Quarantine, until dower assigned. Annuity table. § 2267 *et seq.* Relinquished by joint conveyance of husband and wife, acknowledged (not separately), and recorded. §§ 2501, 2502. By power of attorney executed in conjunction with husband. § 2509. Proceedings for releasing dower of insane wife to husband's purchaser. § 2625.

Washington. Ballinger's Ann. Codes and Statutes. Dower abolished. §§ 4495, 4622. Wife takes by descent, subject to debts: if decedent leave but one child or issue of one child, one half; if more than one child living or one child living and issue of one or more deceased children, one third; if no issue, one half; but if no issue and neither father, mother, sister, nor brother, the whole. § 4620. One half community property goes to wife subject to community debts, and if husband dies without issue and intestate, she takes the whole, subject to community debts, family allowance, and charges and expenses of administration. § 2621.

West Virginia. Code 1891. As at common law and in equitable estates and in rights of entry. In surplus after sale under paramount lien. Barred by any conveyance or devise, of any estate, real or personal, in lieu. But if such provision made before marriage without assent, or during minority, of *feme*, or after marriage, widow may waive provision and demand dower. Barred if wife, of her own free will, leave her husband and live in adultery, unless husband be afterwards reconciled to her and suffer her to live with him; or, if she voluntarily leave husband without such cause as would entitle her to divorce and without such cause and of her own free will be living apart from him at his death. Quarantine, until dower assigned. Annuity table. Chap. 65. Relinquished by joint conveyance of husband and wife acknowledged (not separately) by her. Chap. 73.

Wisconsin. Ann. Stat. 1889. As at common law. Aliens not barred but nonresidents only endowed of lands of which husbands died seised. Election in case of lands exchanged. In lands mortgaged before marriage, as against all persons but mortgagee and persons claiming under. Not as against purchase-money mortgagee. In surplus after sale on mortgage. In residue after mortgage paid. If

lands aliened by husband in lifetime and enhanced in value, dower admeasured as of value at time of alienation. Barred by jointure, before marriage, with her assent, of freehold estate in lands, for her life, to take effect in profit or possession upon husband's death. If she is of age, such assent to be expressed by her joining in conveyance; if under age, by her and her father or guardian joining. Barred by any pecuniary provision for intended wife in lieu, and so assented to. Any such jointure or provision made before marriage without such consent, or made after marriage, puts widow to election. So of devise in lieu. Election to be made within one year after death of husband, otherwise presumed to have elected jointure or provision. § 2159 *et seq.* But in case of devise in lieu, election must be made within one year from date of petition to appoint administrator. Chap. 75, Laws of 1893. Conveyance by life tenant not a forfeiture. § 2202. Nor waste. Phelan *v.* Boylan, 25 Wis. 679. Nor conveyance of excessive estate. § 2056. Right of insane wife, how released. § 2225 *et seq.* Not affected by statute of descent. § 2276. Wife entitled to dower on sentence of husband to imprisonment for life. § 2373. Gross sum allowed in satisfaction of, in partition. § 3135. Release of infant's right. § 3515. Relinquished by wife eighteen years old by joining with husband or his guardian in conveyance duly executed and acknowledged (not separately). By quitclaim deed to one who has lawfully acquired husband's title. § 2222. By power of attorney. § 2223. Surviving wife inherits estates of inheritance and estates *per auter vie* of husband who dies without issue. § 2270.

Wyoming. Rev. Stat. 1899. Dower abolished. Husband dying intestate leaving issue, wife takes by inheritance one half; if no issue, three fourths, unless the estate, real and personal, does not exceed $10,000 in value, in which case wife takes the whole. § 4858.

CHAPTER XVI.

DOWER — PROVISIONS IN LIEU OF DOWER.

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§ 490. **Jointure defined.** — One mode of barring dower is by settling upon the wife an allowance previous to marriage, to be accepted by her in lieu of dower. This is called a jointure, and although once very common in England, it has become of little moment since the Dower Act of 3 & 4 Wm. IV. c. 105 has placed the subject of the wife's dower under the control of the husband in all cases where special provision is not made in

her favor. It is, nevertheless, important to understand the nature and origin of jointures and the rules by which they are generally governed. Jointures are not of the nature of contracts, but of provisions made for the wife.[1]

491. **Two Kinds of Jointure.** — They are of two kinds, — one at law, the other in equity. The former include estates in lands made to a woman in contemplation of marriage or a wife after marriage in satisfaction of dower. They are occasionally used in this country, though what are called equitable jointures are more frequently adopted than those at law.

§ 492. **Treatment of the Subject.** — The subject may be considered under the following heads: I. Legal jointures: (1) made before marriage; (2) made after marriage. II. Equitable jointures: (1) made before marriage; (2) made after marriage. III. Testamentary and other provisions in lieu of dower.

§ 493. **Origin of Jointures.** — Before the time of Henry VIII. there had grown up a species of property in lands called uses, by which, while one man owned the legal estate with all its incidents of seisin, tenure, etc., another had a usufructuary interest in and out of the same, of which he availed himself through the instrumentality of courts of equity. As there could be no seisin of this intangible right, no dower could be acquired in it. And husbands resorted to it as a means of preventing their wives claiming dower, by having estates conveyed to some other person to hold to the use of the husband. Nor was there any way, except by conveyances to uses, by which provision could be made for a wife, by any antenuptial arrangement, which should supersede or bar her future claim for dower, if she survived her husband; and this on technical grounds: first, that at common law no person could bar himself of any right or title to lands by receiving any collateral thing in satisfaction, unless he had actually executed a release; and, second, because, until married, a woman could not execute a valid release of property of her contemplated husband, to which she had till then no title.[2] When, therefore, a husband wished to make provision as a substitute for dower for the wife whom he was

[1] Buckinghamshire *v.* Drury, per Ld. Mansfield, 2 Eden, 72.

[2] Vernon's Case, 4 Rep. 1; Hastings *v.* Dickinson, 7 Mass. 153; Co. Lit. 36 *b*.

about to marry, he had such parts of his lands as were thought a reasonable proportion conveyed by the person who held the legal seisin thereof to some one to the use of the husband and wife for the term of their lives. This created a kind of joint tenancy or jointure, whereby the wife, if she survived the husband, enjoyed the estate during her life. There was this peculiarity in the joint estate of husband and wife, as there still is, that neither could defeat the right of survivorship of the other.[1]

§ 494. **Jointures as affected by Statute of Uses.** — By the statute 27 Henry VIII. c. 10, called the statute of uses, an attempt was made to do away with uses by uniting the legal and equitable estates, and giving them thus united to the one in whose favor the use had been declared. The consequence would have been, had this idea been carried out, that all husbands, *cestuis que use*, would have become seised of the legal estate, and thereby have given dower to their wives, even though these might already have had provision made for them before marriage. To obviate a consequence like this it was provided by that statute, substantially, that if lands were conveyed for the benefit of a wife before marriage, in a manner pointed out, as her jointure, she should not have dower unless evicted from her jointure lands. If such jointure was created after marriage, then she might elect to take the jointure or dower, but not both.[2]

§ 495. **Requisites of Legal Jointure.** — But in order to have such provision operate as a bar to dower, it must conform to all the requirements prescribed by the statute, which are as follows: 1. It must take effect immediately upon the death of the husband. 2. It must be for her own life at least. No estate for years, or *per auter vie*, will answer. 3. It must be made to herself, and not to another in trust for her. 4. It must be made and expressed in the deed to be in full satisfaction of her dower.[3] And, though ordinarily for life only, jointures may be

[1] 2 Bl. Com. 137; Vernon's Case, 4 Rep. 1; Tud. Cas. 730; 1 Atk. Conv. 410, n.; id. 261.

[2] 1 Atk. Conv. 264; 2 Bl. Com. 137; McCartee *v.* Teller, 2 Paige, 511, 562.

[3] 2 Bl. Com. 138; 2 Flint. Real Prop. 197; Co. Lit. 36 *b*; Vernon's Case, 4 Rep. 1, by which it is held that an estate *durante viduitate*, which may continue for her life, would be a good jointure, except in case the wife was a minor. McCartee *v.* Teller, 2 Paige, 562.

estates in fee, and be good.[1] A provision, in order to come within the character of a jointure, must consist wholly of land. If it consists partly of land and partly of an annuity, it will not bar dower unless the annuity is secured upon land.[2] Nor would an estate upon condition be a binding provision for a widow as a jointure, unless upon the husband's death she elect to enter and accept the conditional estate. If she do, she will be bound by it and be barred of dower.[3]

§ 496. **What may constitute Jointure.** — Though a jointure, in its original meaning and common acceptance, implies a joint estate in the husband and wife with the principle of survivorship, it extends to a sole estate limited to the wife alone. Nor is it necessary that it should proceed directly from the husband; it may come from the father or any other person. And it may be by a grant to the wife before coverture, or a grant to her by any person other than her husband during coverture. So it may be by a conveyance to her use either before or during coverture, and may be to the wife and husband jointly, or to the wife alone.[4]

§ 497. **Jointures bar Dower.** — If the jointure complies with the requirements of the statute as to qualities and incidents, it will bar dower, whatever may be its amount.[5] Such will be the effect where it is settled before marriage, though the wife be a minor at the time. Nor is it necessary, though usual, to have the assent of the parents or guardian of the wife in such case, if the provision be a fair one, not illusory in its character; but such assent negatives the idea of the provision being illusory and fraudulent.[6]

§ 498. **When Wife must assent to Jointure.** — Nor is it even necessary that the wife herself should, in England, assent to

[1] 1 Roper, Hus. & Wife, 465.

[2] Vance *v.* Vance, 21 Me. 364.

[3] Clancy, Rights of Wom. 209; Vernon's Case, 4 Rep. 1; McCartee *v.* Teller, 2 Paige, 562; Caruthers *v.* Caruthers, 4 Bro. C. C. 500.

[4] 2 Flint. Real Prop. 196; 1 Roper, Hus. & Wife, 465; 3 Prest. Abs. 376; 1 Cruise, Dig. 195.

[5] 1 Atk. Conv. 266; Drury *v.* Drury, 2 Eden, 39, 57; Buckinghamshire *v.* Drury, 2 Eden, 75, n.; 1 Bright, Hus. & Wife, 434.

[6] Co. Lit. 36 *b*; 3 Prest. Abs. 377; Buckinghamshire *v.* Drury, 2 Eden, 64, 74; McCartee *v.* Teller, 2 Paige, 556; 1 Roper, Hus. & Wife, 471; 1 Cruise, Dig. 196.

the jointure before marriage. But while the law as to jointures is adopted in most of the United States, the statutes generally require the wife to be made a party to the deed and express her assent in the deed, if of full age; if under age, by joining with her father or guardian in the conveyance.[1]

§ 499. **If the Widow is evicted from her Jointure** lands by defect of title, she may be remitted to her right of dower *pro tanto* or in the whole, as the case may be, out of her husband's estate.[2]

§ 500. **Jointure settled after Marriage.** — If the jointure is not settled upon the wife until after the marriage, it is no further binding upon her than that she must elect, at the husband's death, to take it in lieu of dower, or to take her dower; she cannot have both.[3] But it is not a jointure unless so expressed, although it be by deed from husband to wife, in consideration of love and affection.[4]

§ 501. **Widow may enter at once into Jointure Lands.** — When a jointure takes effect, whether settled before or after marriage, the widow is at liberty to enter at once into the occupation and enjoyment of it upon the death of the husband,[5] though it is said that she may not claim the annual crops growing at the time of his death.[6]

§ 502. **Jointures have Incidents of Life Estates.** — While she holds her jointure lands, if she has only a life estate in them, she holds them subject to the same restrictions as tenants for life, unless there was a covenant in the instrument settling them upon her that her jointure should be of a certain yearly value. In such case, if it can only be raised by committing waste, she may commit it so far as is necessary.[7]

§ 503. **How Jointure may be lost.** — A wife does not at law lose her jointure, as she would her dower, by eloping and

[1] See *ante*, note at the end of § 489.

[2] 1 Atk. Conv. 269 ; 3 Prest. Abs. 377 ; 4 Dane, Abr. 685, 686.

[3] McCartee *v.* Teller, 2 Paige, 556; 2 Flint. Real Prop. 197.

[4] Bubier *v.* Roberts, 49 Me. 463 ; *post*, § 530. See, for the common law, Reed *v.* Dickerman, 12 Pick. 149.

[5] Hastings *v.* Dickinson, 7 Mass. 146, 153 ; 2 Crabb, Real Prop. 217 ; 2 Flint. Real Prop. 199.

[6] 1 Cruise, Dig. 201 ; 3 Dane, Abr. 123. In which respect she has not the rights of a dowress.

[7] 1 Atk. Conv. 272.

living in adultery.[1] But if she and her husband join in conveying away the lands settled upon her before marriage, as a jointure, she thereby loses both dower and jointure; but if settled after marriage, she is remitted to her right to claim dower.[2]

§ 504. **Statute of Uses in the United States.** — The statute of uses has been substantially adopted in most of the United States, though modified in some particulars. As in Ohio, where a minor has the election to take dower or her jointure, though settled before marriage.[3] But in Massachusetts it has been held that, under the statute of Henry VIII., a wife cannot bar herself of her dower by any covenant not to claim it in consideration of anything else than a freehold estate settled upon her, as she cannot before marriage release a right which is not in existence.[4]

§ 505. **Equitable Jointures.** — Though equitable jointures are not within the statute of Henry VIII., they are held to be equally operative, when taking effect, to bar dower as those created by law. Such a jointure will bind an infant in the same way as a legal one, if it is settled upon her before marriage by the consent and approbation of her parents or guardian. And a provision in lieu of dower for an infant, if so assented to before marriage, is an equitable bar to dower, if it is as certain a provision as her dower would be.[5]

§ 506. **Equitable Jointures require Assent.** — If the woman be of age at her marriage, there must be an express agreement on her part to accept the provision made in lieu of dower in order to bar her right thereto. She may, if she pleases, take a chance in satisfaction of dower. The difference between this equitable and a legal jointure is, that the latter is not a contract for a provision, but a provision made; while the former proceeds on the idea of a contract on the part of the

[1] 1 Cruise, Dig. 209. But this is now altered by statute in several States.

[2] Co. Lit. 36 *b*.

[3] 4 Kent, Com. 56, n., 8th ed. ; Wms. Real Prop. 193, Am. note ; Andrews *v.* Andrews, 8 Conn. 79. See also Craig *v.* Walthall, 14 Gratt. 518 ; *ante*, note at the end of § 489.

[4] Hastings *v.* Dickinson, 7 Mass. 153 ; Gibson *v.* Gibson, 15 Mass. 106, 110.

[5] McCartee *v.* Teller, 2 Paige, 559 ; Tud. Cas. 49 ; Corbet *v.* Corbet, 1 Sim. & Stu. 612 ; 1 Atk. Conv. 267 ; Drury *v.* Drury, 2 Eden, 60 ; Caruthers *v.* Caruthers, 4 Bro. C. C. 513 ; Clancy, Rights of Wom. 221 ; 4 Dane, Abr. 686.

wife to accept a certain provision in lieu of dower.[1] If the provision for the infant be precarious or uncertain, she will not be bound by it as a bar to dower, and has her election to take it or dower.[2] And to bar a widow by a jointure of a chattel interest, there must be an express assent to receive it, though she could not have both that and dower.[3] The above is put to illustrate the proposition that, if agreed to, any provision, whether a chattel interest in land or a pecuniary obligation, will bar a claim for dower in equity. And even "a chance" in satisfaction may be sufficient, if so understood by her, according to some authorities, though earlier ones insist that the provision she agrees to accept, though it may be inadequate, must be an available one.[4] The great case of Drury *v.* Drury held an annuity of £600, although not charged upon land and agreed to by an infant before marriage, a good bar of dower.[5] But where the antenuptial contract only secured to her what then belonged to her, but contained no recital that it was in lieu of dower, it was held that it was no bar to her claim for dower.[6]

§ 507. **When Widow may elect Dower or Jointure.** — If the equitable jointure be made after marriage, the wife may elect as in case of legal jointures, either to take that or her dower.[7] And the intention to bar dower by such provision must also appear, in order to have that effect, though the form of expressing this is immaterial, provided such intention can be shown by evidence required by the statute of frauds, and not by parol.[8] But this intention may be apparent from the

[1] Caruthers *v.* Caruthers, 4 Bro. C. C. 507, n., 512, 513; Dyke *v.* Rendall, 2 De G. M. & G. 209 ; Tud. Cas. 49 ; 2 Sugd. Vend. 219 ; Clancy, Rights of Wom. 221.

[2] Caruthers *v.* Caruthers, 4 Bro. C. C. 513 ; Clancy, Rights of Wom. 221 ; Smith *v.* Smith, 5 Ves. 189 ; Tud. Cas. 49 ; 2 Sugd. Vend. 220.

[3] Charles *v.* Andrews, 2 Eq. Cas. Abr. 388.

[4] Caruthers *v.* Caruthers, 4 Bro. C. C. 513, n. ; Power *v.* Sheil, 1 Molloy, Rep. 296 ; Chit. Dig. Jointure, M. § 11 ; 2 Sugd. Vend. 543 ; Dyke *v.* Rendall, 2 De G. M. & G. 209 ; Tud. Cas. 49 ; 1 Roper, Hus. & Wife, 480 ; Clancy, Rights of Wom. 223.

[5] Drury *v.* Drury, 2 Eden, 39.

[6] Swaine *v.* Perine, 5 Johns. Ch. 482, 489. See Woods *v.* Shurley, Cro. Jac. 490 ; 4 Dane, Abr. 685.

[7] 1 Roper, Hus. & Wife, 482 ; Swaine *v.* Perine, 5 Johns. Ch. 482.

[8] Clancy, Rights of Wom. 228 ; 1 Roper, Hus. & Wife, 483 ; Tenny *v.* Tenny, 3 Atk. 8 ; Couch *v.* Stratton, 4 Ves. 391.

nature of the provision, and the inconsistency of taking both that and dower, and so may sufficiently appear.[1] But if it only satisfies a part of the widow's dower, she will not be bound by it, but may give it up and claim her dower.[2]

§ 508. **How Equitable Jointures bar Dower.** — The way in which equitable jointures are rendered effective to bar widows' claims of dower, at law, is, that where they are satisfactorily shown to have been made, the courts of equity will restrain the claimants from prosecuting a suit at law to enforce their common law right.[3]

§ 509. **The Effect of being evicted from an Equitable Jointure** by a superior title seems to be the same as in the case of a legal one, giving the widow a right to claim her dower in whole or *pro tanto*, as the case may be, out of her husband's other estate.[4] And an alienation, by the husband, of the fund out of which the jointure was to arise, will be deemed an eviction of the same, and let her in for her dower.[5]

§ 510. **Effect of relinquishing Jointure.** — In accordance with this doctrine, where a contract before marriage fixed the share the wife was to take, and excluded her from all other parts of the estate, and this contract was given up to the husband during coverture and by him destroyed, it was held that she was remitted to her right of dower.[6] So, where a wife before marriage agreed to claim no part of her husband's then estate, she was held to be remitted to her right of dower by his abandoning her and violating his duties of husband towards her.[7]

§ 511. **Jointures in the United States.** — When the law as to jointure in the United States is considered, it is understood to be, except where it has been modified by statute, substantially the same as that of England before the late Dower Act. It was held in Massachusetts, that, though a widow would not

[1] Sugd. Vend. 219 ; Clancy, Rights of Wom. 229 ; Tud. Cas. 50.

[2] 1 Roper, Hus. & Wife, 483.

[3] Buckinghamshire *v.* Drury, 2 Eden, 60, 68 ; Beard *v.* Nutthall, 1 Vern. 427.

[4] Wms. Real Prop. 193.

[5] 2 Sugd. Vend. *543, citing Drury *v.* Drury, 2 Eden, 60 ; Power *v.* Sheil, 1 Molloy, Rep. 296.

[6] Gangwere's Estate, 14 Penn. St. 417.

[7] Spiva *v.* Jeter, 9 Rich. Eq. 434.

be barred of her dower by an antenuptial covenant not to claim it, yet if she entered into such a covenant, for a valuable consideration, which had not failed, if she recovered her dower, she would be liable upon her covenants in a sum in damages equal to the value of her dower.[1] After that decision, there was a statute providing for barring dower by a jointure in lands or money made before marriage, the wife, if of age, expressing her assent by becoming party to the instrument, or, if under age, executing it with her father or guardian.[2] And where, by the antenuptial agreement, a wife relinquished all right of dower, but her husband only settled upon her her own estate, it was held not to bar her of claiming dower at law. A jointure, to be a bar, must be something conceded to the wife.[3] But a *bona fide* antenuptial arrangement, entered into with full knowledge, and making reasonable provision for the wife, may bar her as an equitable jointure.[4] And in Maryland an infant may bar herself of dower by a contract entered into before marriage.[5]

§ 512. **Testamentary Jointures.** — In many cases a widow is barred of her dower by a testamentary provision, made for her by her husband, which, though not properly a jointure, operates like one, if she accepts it, which she may do at her election, or may decline and claim her dower. And there are numerous cases where she may claim both the provision and dower. Where by the terms of the husband's will she cannot take both, she is at liberty to elect which she will take. And this right of election is a personal one, and is not transmissible by descent.[6] And the intention of the tes-

[1] Gibson *v.* Gibson, 15 Mass. 106.

[2] Pub. Stat. c. 124, § 8; Vincent *v.* Spooner, 2 Cush. 473.

[3] Blackmon *v.* Blackmon, 16 Ala. 633. See also Whitehead *v.* Middleton, 2 How. (Miss.) 692; *contra*, Gelzer *v.* Gelzer, 1 Bailey, Ch. (S. C.) 387; Forwood *v.* Forwood, 86 Ky. 114; s. c. 5 S. W. Rep. 361.

[4] Stilley *v.* Folger, 14 Ohio, 610.

[5] Levering *v.* Heighe, 2 Md. Ch. 81. See 1 Bright, Hus. & Wife, 461; Perry *v.* Perryman, 19 Mo. 469. See 1 Bright, Hus. & Wife, 449; and for further citations bearing out the propositions of the text, see 1 Greenl. Cruise, 200, note, and 4 Kent, Com. 56, note.

[6] Welch *v.* Anderson, 28 Mo. 293; Bubier *v.* Roberts, 49 Me. 460. Nor to be

tator in this respect must be gathered from the will, and is not to be proved by parol.[1] Thus, for instance, if the devise be in terms *in lieu of dower*, she may take either, but not both.[2] But though a pecuniary provision, if made in lieu of dower, and the same is accepted, it will bar her claim for dower.[3] And when, under the exercise of the right of election, she accepts a provision by will in the place of dower, she takes it as a purchaser, and holds it in preference to other legatees.[4] So where the devise is wholly inconsistent with the claim of dower, or where it would prevent the whole will from taking effect if dower is claimed.[5] To prevent a widow claiming both the provision in a will and her dower, she must, by enforcing her claim of dower, defeat or interrupt or disappoint some provision of the will.[6]

§ 513. **Where a Widow accepts a Testamentary Provision** given her in lieu of dower, it cuts off her claim to lands aliened by the husband in his lifetime, as well as to those acquired after the making of the husband's will, and constitutes a legal as well as an equitable bar.[7] In analogy to the effect produced by the election of a testamentary provision in lieu of dower, it has been held that, if the husband, during coverture, con-

exercised by her guardian if she is insane. Pinkerton *v.* Sargent, 102 Mass. 568; Crenshaw *v.* Carpenter, 69 Ala. 562; Crozier's Appeal, 90 Penn. St. 384.

[1] Hall *v.* Hall, 8 Rich. (S. C.) 407; Stark *v.* Hunton, Saxton (N. J.), 216; Whilden *v.* Whilden, Riley, Ch. (S. C.) 205; Herbert *v.* Wren, 7 Cranch, 370, 378; Higginbotham *v.* Cornwell, 8 Gratt. 83.

[2] Van Orden *v.* Van Orden, 10 Johns. 30; 2 Crabb, Real Prop. 177; Chapin *v.* Hill, 1 R. I. 446; Raines *v.* Corbin, 24 Ga. 185; Pemberton *v.* Pemberton, 29 Mo. 408; 4 Dane, Abr. 685; 7 id. 426.

[3] Trueman *v.* Waters, 4 Dane, Abr. 676.

[4] Hubbard *v.* Hubbard, 6 Met. 50; Pollard *v.* Pollard, 1 Allen, 490; Towle *v.* Swasey, 106 Mass. 105.

[5] Incledon *v.* Northcote, 3 Atk. 430, 437; Kennedy *v.* Nedrow, 1 Dall. 415, 418; Herbert *v.* Wren, 7 Cranch, 370; Allen *v.* Pray, 12 Me. 138; Duncan *v.* Duncan, 2 Yeates, 302; Creacraft *v.* Wions, Addis. 350; White *v.* White, 16 N. J. 202; Green *v.* Green, 7 Porter (Ala.), 19; Adsit *v.* Adsit, 2 Johns. Ch. 448; Sanford *v.* Jackson, 10 Paige, 266; Lewis *v.* Smith, 9 N. Y. 502. See Bull *v.* Church, 5 Hill, 206.

[6] Corriell *v.* Ham, 2 Iowa, 552; Pratt *v.* Douglass, 38 N. J. Eq. 516.

[7] Chapin *v.* Hill, 1 R. I. 446; Allen *v.* Pray, 12 Me. 138; Kennedy *v.* Mills, 13 Wend. 553; Evans *v.* Pierson, 9 Rich. 9.

veys a portion of his land in which the wife does not join, and then dies, leaving no children, in which case the law gave her an election to take one half of his property or dower out of his estate, if she elects to take the half, she would thereby bar her claim of dower out of the premises conveyed by her husband in his lifetime.[1] But in Pennsylvania, under the statute of that State, she would not by such acceptance be barred of her dower in lands aliened by the husband before making the will.[2]

§ 514. **Intention to bar Dower must be clear.** — Unless the intention to bar the widow's dower is clear in case of testamentary provision for her, she will be held entitled to both, where there is no statute provision to the contrary.[3] [For the statutory presumptions in the several States, see note at the end of § 489.]

§ 515. **Where Widow is required to elect.** — So in many of the States she must signify her election of dower within some certain period prescribed by statute, or she will be deemed to have elected to accept the provision in bar of it, unless the will clearly gives her both.[4] Where the widow dies within the period given by the statute, in which to make election, without having made it, the law will presume the election to be that which is most favorable for her.[5] Though in Maryland and North Carolina, it has been held, if she so die, her representatives will be bound by the provisions of the husband's will, as the right of election is a personal one which no one but herself can exercise.[6]

[1] Hornsey *v.* Casey, 21 Mo. 545 ; Same *v.* Same, 23 Mo. 371.

[2] Borland *v.* Nichols, 12 Penn. St. 38. The same rule is adopted in Virginia. Higginbotham *v.* Cornwell, 8 Gratt. 83.

[3] Herbert *v.* Wren, 7 Cranch, 370; Higginbotham *v.* Cornwell, 8 Gratt. 83 ; Kennedy *v.* Nedrow, 1 Dall. 418 ; Smith *v.* Kniskern, 4 Johns. Ch. 9 ; Adsit *v.* Adsit, 2 Johns. Ch. 448 ; Walker's Int. 325 ; Hilliard *v.* Binford, 10 Ala. 977, 987 ; Evans *v.* Webb, 1 Yeates, 424 ; Pickett *v.* Peay, 3 Beav. 545 ; Church *v.* Bull, 2 Denio, 430 ; Ostrander *v.* Spickard, 8 Blackf. 227 ; Tooke *v.* Hardeman, 7 Ga. 20 ; Norris *v.* Clark, 2 Stockt. 51 ; Van Arsdale *v.* Van Arsdale, 26 N. J. 404 ; Mills *v.* Mills, 28 Barb. 454 ; Clark *v.* Griffith, 4 Iowa, 405 ; Yancy *v.* Smith, 2 Met. (Ky.) 408 ; Dodge *v.* Dodge, 31 Barb. 413 ; Durfee, Pet., 14 R. I. 47.

[4] See note at the end of § 489.

[5] Merrill *v.* Emery, 10 Pick. 507.

[6] Boone *v.* Boone, 3 Har. & McH. 95; Collins *v.* Carman, 5 Md. 503; Lewis *v.* Lewis, 7 Ired. 72. So by statute in Pennsylvania. Acts 1865.

§ 516. **Where she may elect in what Character to take.** — Besides this general power of election between a devise and dower, the widow often may elect in what capacity she shall take what is devised to her, where it is left equivocal whether as dowress or devisee. And this becomes an important distinction where the husband leaves creditors.[1] Thus in one case a husband mortgaged his estate, his wife not joining in the deed. By his will he devised her the whole of his estate with remainder over. After his death the mortgagee foreclosed his mortgage, making the widow party to the suit. But it was held that she still might claim dower in one third of the premises, and two thirds as devisee, since the judgment only bound those who claimed under the mortgagor as mortgagor, and her right as dowress had attached before the mortgage, and was paramount to that.[2]

§ 517. **How Election evidenced.** — An election in these cases may be evidenced by acts *in pais*, such as entering upon the land devised, as well as by matter of record, where it is done with a full knowledge of the facts in respect to the provision.[3] But ordinarily, wherever a widow fairly and understandingly has elected to take the provision of a will instead of dower, she cannot afterwards revoke it and claim dower.[4]

§ 518. **When Jointress, having elected, is remitted to Right of Dower.** — And yet it has been held that if she has been substantially deprived of such provision, she is remitted to her right of dower.[5] And if it turns out that nothing passes by the devise, she may claim her dower, though she may once have elected to take the provision of the will.[6] If no provision is made for her by the will, she need not dissent from the will in order to claim her dower.[7]

[1] Mitchell *v.* Mitchell, 8 Ala. 414.

[2] Lewis *v.* Smith, 9 N. Y. 502, 512.

[3] Delay *v.* Vinal, 1 Met. 57 ; Ambler *v.* Norton, 4 Hen. & M. 23 ; Tooke *v.* Hardeman, 7 Ga. 20.

[4] Davison *v.* Davison, 15 N. J. 235. Nor claim a share of lapsed legacies. *Re* Benson's Accounting, 96 N. Y. 63. See Mathews *v.* Mathews, 141 Mass. 511.

[5] Hastings *v.* Clifford, 32 Me. 132 ; Thompson *v.* Egbert, 17 N. J. 459. See also Thomas *v.* Wood, 1 Md. Ch. 296.

[6] Chew *v.* Farmers' Bank, 9 Gill, 361 ; Osmun *v.* Porter, 39 N. J. Eq. 141.

[7] Green *v.* Green, 7 Porter (Ala.), 19 ; Martin *v.* Martin, 22 Ala. 86. For further references upon the subject of election, by a widow in case of a will, etc.,

§ 519. **Antenuptial Covenant no Bar.** — [It would seem that no antenuptial covenant not to claim dower, made by the wife in consideration of marriage, will operate to bar dower.[1]]

the reader is referred to 1 White & Tud. Cas. (Am. ed.) 284–289 and n. If an infant receive a negotiable note in lieu of dower, she cannot claim both to sue on it, and also to have dower. Drew *v.* Drew, 40 N. J. Eq. 458.

[1] Curry *v.* Curry, 10 Hun (N. Y.), 366; Hinkle *v.* Hinkle, 34 W. Va. 142; s. c. 11 S. E. Rep. 993; and see *ante*, § 511. *Contra*, Forwood *v.* Forwood, 86 Ky. 114; s. c. 5 S. W. Rep. 361.

CHAPTER XVII.

ESTATES DURING COVERTURE.

§ 520. Husband's estate in wife's lands during coverture.
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522. Wife's equitable separate estate.
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§ 520. **Husband's Estate in Wife's Lands during Coverture.** — By the common law, the rights of the wife to her property became for the time being merged by the coverture. And if this property consists of lands, the husband alone is entitled to the rents and profits thereof,[1] subject however to be divested by a divorce *a vinculo*.[2] And if rents are due when the husband dies, they go to his personal representatives, and not to the wife as survivor.[3] Whereas, in many of the United States, as will be seen, the wife may hold, manage, and convey her lands like a *feme sole*. The interest which a husband has, at common law, in his wife's lands, is regarded as a freehold, since it is for an uncertain period which may continue during the

[1] 1 Bl. Com. 442; Wms. Real Prop. 182.
[2] Burt *v.* Hurlburt, 16 Vt. 292; Oldham *v.* Henderson, 5 Dana, 254.
[3] Shaw *v.* Partridge, 17 Vt. 626.

term of his life.[1] But under the present statutes of Massachusetts relating to married women, the husband has no freehold in his wife's land. And the right of possession remains in her notwithstanding his deed of the same to another. His deed would only operate as an estoppel to his claiming curtesy against his grantee.[2] But if the interest of the wife be a reversionary one, subject to a prior freehold, the husband has no control over it, and a conveyance of it by him would be void. He must have a present right of seisin or possession to exercise control over it.[3] He might, therefore, make himself a tenant to the *præcipe*, or convey a freehold in such lands to another.[4] Thus, where an indenture intended to be signed by husband and wife, releasing lands belonging to her, was signed by the husband only, it was held to operate as a release during their joint lives.[5]

§ 521. **Joint Seisin of Wife's Land.** — Still the husband, in such case, does not by his marriage acquire a sole seisin. The seisin is regarded as a joint one, and in both. Both together have the whole estate, and therefore, in law, they are both considered as seised in fee, and must so state their title in pleading.[6] * And until the birth of a child, the interest of the husband in the wife's estate is so far inchoate, that, if the wife forfeited her inheritance before that event by any act like that of treason, it defeated the interest of the husband.[7]

* Note. — In addition to what has already been said (*ante*, § 345) upon the subject, the authorities, with the exception of the case there cited from the New Hampshire Reports, seem to be uniform that the seisin of husband and wife of the wife's land is a joint one, and not the separate seisin of either. Co. Lit. 67 *a*; 1 Bright, Hus. & Wife, 112; Polyblank *v.* Hawkins, Dough. 329; Took *v.* Glascock, 1 Saund. R. 253, n. 4; Poole *v.* Longueville, 2 Saund. 283, n. 1; Moore *v.* Vinten, 12 Sim. Ch. 161, 164; Hall *v.* Sayre, 10 B. Mon. 46; Coe *v.* Wolcottville Mg. Co., 35 Conn. 175.

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[1] 1 Roper, Hus. & Wife, 3; Melvin *v.* Proprietors, 16 Pick. 161; Babb *v.* Perley, 1 Me. 7; Co. Lit. 351 *a*.

[2] Walsh *v.* Young, 110 Mass. 396.

[3] Shores *v.* Carley, 8 Allen, 425.

[4] Co. Lit. 326 *a*, n. 280; McClain *v.* Gregg, 2 A. K. Marsh. 454; Trask *v.* Patterson, 29 Me. 499; Mitchell *v.* Sevier, 9 Humph. 146; Clancy, Rights. Wom. 161.

[5] Robertson *v.* Norris, 11 Q. B. 916.

[6] Melvin *v.* Proprietors, 16 Pick. 165; Com. Dig. Baron and Feme, E. 1; Catlin *v.* Milner, 2 Lutw. 1421; Clancy, Rights of Wom. 161; *ante*, § 345.

[7] 1 Bright, Hus. & Wife, 113; Co. Lit. 351 *a*.

§ 522. **Wife's Equitable Separate Estate.** — Equity often adopts an entirely different rule from that of the common law in respect to a wife's separate interest in her own lands during coverture, where the intention of the person limiting them to the wife was, in so doing, to secure them to her separate use. Nor is this only in case of their being expressly given to trustees for her benefit. If by the terms of the limitation the intention to exclude the marital rights of the husband does not appear, equity will follow the law, and suffer him to enjoy the rents and profits, even where the lands are held by trustees. Whereas, if the limitation is clearly to the sole and separate use of the wife, equity will, if no trustee is appointed, hold the husband himself as the wife's trustee, and compel him to execute the trust by giving her the rents and profits, to be subject to her sole control. And this is said to be the rule in equity on both sides of the Atlantic.[1] No particular form of expression is necessary to determine whether the wife alone or husband shall have the benefit of the trust estate. But the intention must be clear, in order to secure such separate use to the wife, and to exclude the marital rights of the husband.[2]

§ 523. **Limitation of Wife's Equitable Separate Estate.** — The words "sole" and "separate," applied to the nature of the intended use by the wife, are the most appropriate to express a limitation in her favor, exclusive of any interest or control on the part of the husband.[3]

§ 524. **Wife's Control of her Separate Estate.** — One of the great objects in modern marriage settlements is to secure to the wife a share of the property free from the debts and control of her husband. And this is often so done, that in order to protect her against the solicitations or influence of her husband, she will not be allowed by chancery to assign or anticipate her income.[4] But while no particular form of words is required, if

[1] Clancy, Rights of Wom. 256, 257; Hill, Trust. 406; id. 420, and Rawle's n. 1; 1 White & Tud. Lead. Cas. 378; Cochran *v.* O'Hern, 4 Watts & S. 95; Trenton Bk. *v.* Woodruff, 1 Green, Ch. 117; Knight *v.* Bell, 22 Ala. 198; Long *v.* White, 5 J. J. Marsh. 226; Fears *v.* Brooks, 12 Ga. 195; Blanchard *v.* Blood, 2 Barb. 352; Stuart *v.* Kissam, 2 Barb. 493; Porter *v.* Rutland Bk., 19 Vt. 410.

[2] Welch *v.* Welch, 14 Ala. 76; Fears *v.* Brooks, 12 Ga. 195; Hill, Trusts, 406; 1 White & Tud. Lead. Cas. 338; Tritt *v.* Colwell, 31 Penn. St. 228.

[3] Goodrum *v.* Goodrum, 8 Ired. Eq. 313; 1 White & Tud. Lead. Cas. 338.

[4] Wms. Real Prop. 183; Coote, Mortg. 104.

the intention is clear to impose a restriction upon the wife as to anticipation or assignment of her income, she may, unless thus specially restricted, dispose of it by sale, contract, or mortgage, as if she where a *feme sole*, according to the English rules in equity.[1]

§ 525. **Same Subject, continued — Rule in the United States.** — The courts of the several States have not been uniform in applying the principle of restriction to wives in respect to estates held in trust for them. In some, the English rules of chancery are adopted; in others, the wife is not permitted to go beyond the power expressly given by the deed of settlement.[2]

§ 526. **Husband and Wife cannot take by Purchase in Common** — In consequence of the theoretic unity and entirety of the ownership of husband and wife in respect to their interest in lands, they cannot take by purchase in moieties: and where land was conveyed to them to hold in common and not in joint tenancy, they were held to take an entirety of estate without regard to the intent.[3]

§ 527. **The Entirety of their Estates.** — They are not properly joint tenant of such lands, since, though there is a right of survivorship, neither can convey so as to defeat this right in the other. Each takes an entirety of the estate.[4] In Iowa, a

[1] Hill, Trust. 421; White v. Hulme, 1 Bro. C. C. 16.

[2] Instead of illustrating these doctrines by the citation of the numerous cases which have arisen in the several States, the reader is referred for these cases to Hill on Trusts, 421, note by Wharton; Wms. Real Prop. 184, note by Rawle, or 1 White & Tud. Lead. Cas. 370–378, Hare & Wallace's notes. By a reference to these authorities, it will appear that the English rule is substantially adopted in New Jersey, Connecticut, Kentucky, North Carolina, Alabama, Georgia, and Missouri. In Pennsylvania, South Carolina, Mississippi, Tennessee, Virginia, Rhode Island, the wife is governed by the terms expressly prescribed in the deed, etc. In New York, the matter is regulated by statute. Lalor, Real Est. 173, 174.

[3] Stuckey v. Keefe's Ex'rs, 26 Penn. St. 397.

[4] Gibson v. Zimmerman, 12 Mo. 385; Bomar v. Mullins, 4 Rich. Eq. 80; Brownson v. Hull, 16 Vt. 309; Todd v. Zachary, 1 Bashee, Eq. 286; Den v. Whitemore, 2 Dev. & B. 537; Den v. Hardenbergh, 5 Halst. 42; Fairchild v. Chastelleux, 1 Penn. St. 176; Harding v. Springer, 14 Me. 407; Jackson v. Stevens, 16 Johns. 110; Needham v. Branson, 5 Ired. 426; Ross v. Garrison, 1 Dana, 35; Taul v. Campbell, 7 Yerg. 319; Tud. Cas. 730. In Connecticut, however, they are joint tenants, and the husband may convey his interest. Whittlesey v. Fuller, 11 Conn. 337. And it is said that they may by express words be made tenants in common by a gift to them during coverture. Prest. Abs. 41.

conveyance or devise to husband and wife makes them tenants in common, unless the instrument expressly creates a joint estate.[1] But in Mississippi, where, by law, joint tenancies are converted into tenancies in common, conveyances to husbands and wives create tenancies by entirety, which are still retained.[2]

§ 528. **Husband and Wife as Grantees, as Devisees.** — As a consequence of the principle that husband and wife are one in law, if lands are given to A and B, husband and wife, and C, the husband and wife take a moiety, and the other grantee a moiety.[3] But if lands descend to A, B, and C, they each take a third part, though A and B happen to be husband and wife.[4] So if lands descend or are devised to A and B, who afterwards intermarry, they still remain joint tenants or tenants in common of the lands, just as before marriage.[5]

§ 529. **Suits in Respect to Wife's Land.** — The husband alone can sue for an injury affecting the rents alone of the wife's land.[6] But if the injury affect the inheritance, the action must be in their joint names, and it will survive to her if she outlive him.[7] So if a tenant occupies the wife's lands by the consent of husband and wife, and she dies, the husband can maintain an action in his own name for use and occupation.[8]

§ 530. **Conveyances between Husband and Wife.** — By the common law neither husband nor wife could convey lands to each other,[9] nor release to each other.[10] But the husband may do this by means of the statute of uses, by conveying to another to the wife's use,[11] or by a covenant with a third person to stand seised to her use.[12] And in Maine, husband and wife

[1] Hoffman *v.* Stigers, 28 Iowa, 302.

[2] Hemingway *v.* Scales, 42 Miss. 1.

[3] Lit. § 291 ; Wms. Real Prop. 184 ; Tud. Cas. 730.

[4] Knapp *v.* Windsor, 6 Cush. 156.

[5] Tud. Cas. 731 ; Co. Lit. 187 *b*.

[6] Fairchild *v.* Chastelleux, 1 Penn. St. 176 ; Wms. Real Prop. 184, n. ; Babb *v.* Perley, 1 Me. 6 ; Mattocks *v.* Stearns, 9 Vt. 326.

[7] 2 Kent, Com. 131 ; Babb *v.* Perley, 1 Me. 6 ; Dippers at Tunbridge Wells, 2 Wils. 414, 423.

[8] Jones *v.* Patterson, 11 Barb. 572.

[9] Martin *v.* Martin, 1 Me. 394 ; Voorhees *v.* Presb. Ch., 17 Barb. 103.

[10] Frissel *v.* Rozier, 19 Mo. 448.

[11] Wms. Real Prop. 185 ; 1 Roper, Hus. & Wife, 53.

[12] Thatcher *v.* Omans, 3 Pick. 521.

may convey directly to each other, and the same is true as to a husband conveying by deed to his wife, in Minnesota,[1] and in Iowa.[2]

§ 531. **Such Conveyances sustained in Equity** — And courts of equity will sometimes sustain a deed from husband to wife against the grantor's heir-at-law.[3] And a devise by husband to wife may always be good, as the coverture ceases before the devise can take effect.[4]

§ 532. **Effect of Husband's Death on Wife's Estate.** — Upon the death of the husband, the wife's inheritance remains to her unaffected by any alienation made or incumbrance created thereon by the husband. No further act is required on her part to put an end to such alienation or conveyance than a simple entry, instead of her being driven to an action, as was the case at the common law.[5]

§ 533. **When Wife may be Grantee of Lands.** — It is no objection to a woman's being a grantee of lands from a stranger, that she is a *feme covert*, unless her husband objects by some express dissent, the law always presuming his assent unless the contrary be shown. But it is said that she cannot take as a purchaser if he expressly objects to her accepting the estate, and that such disagreement on his part divests the whole estate.[6] A husband may dissent from a purchase by, or devise to, his wife, since otherwise he might be made a tenant to his own disadvantage. But he cannot by his dissent defeat her title as heir.[7]

§ 534. **When she may disavow Conveyance to her.** — It is laid down by Coke,[8] that a wife may waive a purchase of land made by her during coverture, and, after the decease of her husband, avoid the conveyance, though he had assented to it; and that her

[1] Bubier *v.* Roberts, 49 Me. 460; Johnson *v.* Stillings, 35 Me. 427; Allen *v.* Hooper, 50 Me. 371; Wilder *v.* Brooks, 10 Minn. 50.

[2] Hoffman *v.* Stigers, 28 Iowa, 302, 310.

[3] Jones *v.* Obenchain, 10 Gratt. 259; Hunt *v.* Johnson, 44 N. Y. 27, 37, 41.

[4] 1 Roper, Hus. & Wife, 53; Lit. § 168.

[5] Stat. 32 Hen. VIII. c. 28; 1 Roper, Hus. & Wife, 56; Cleary *v.* McDowall, 1 Cheves (S. C.), 139; Wms. Real Prop. 185; Bruce *v.* Wood, 1 Met. 542; 1 Bright, Hus. & Wife, 162; Mellus *v.* Snowman, 21 Me. 201.

[6] Co. Lit. 3 *a*; Com. Dig. "Baron & Feme," P. 2; Perkins, §§ 43, 44.

[7] 1 Dane, Abr. 368; 4 id. 597.

[8] Co. Lit. 3 *a*.

heirs may do the same after her death, if, after her husband's death, she shall not have agreed to the purchase. But where, as in this country, a wife, by joining with her husband in a deed, may part with her lands and pass a good title, the joint act of the two being in all respects as available as if done by her while sole, it would seem that their joint assent in accepting a title should be as valid as in granting one. And in New Hampshire it has been held that a deed to a *feme covert*, made with her own and her husband's assent, vested the title legally in her. And in Vermont it has been held that a deed of gift to a wife during coverture, if accepted by her husband, is accepted by her, and that her refusal apart from him is of no consequence.[1]

§ 535. **Wife's Land, how conveyed in England.** — Unless restrained by the terms of the settlement, a married woman may, since the statute of 3 & 4 Wm. IV. c. 74, by joining in a deed with her husband, convey any interest she has in real estate. Such a deed would of course convey the interest of both. Previous to that statute this was usually done, in England, by levying a fine, which, as well as recoveries, is abolished by that statute.[2]

§ 536. **Wife's Land, how conveyed in the United States.** — In the United States, the custom of a wife's joining with her husband in a deed of conveyance of her lands has prevailed from a very early period in their history. In most, if not all of them, there are now existing statutes upon the subject, regulating the mode in which such deeds shall be executed in order to be valid.[3] And sometimes equity will sustain a deed from husband to wife, though void at law.[4] And in Maine, a wife may do this, though not of the age of twenty-one years.[5] The discussion of the form of such deeds, however, properly belongs to another part of this work.

§ 537. **Husband cannot recover for Improvements.** — If the husband expend money upon lands of his wife in his occupa-

[1] Gordon *v.* Haywood, 2 N. H. 402; Brackett *v.* Wait, 6 Vt. 411, 424.

[2] Wms. Real Prop. 188.

[3] Davey *v.* Turner, 1 Dall. 11; Jackson *v.* Gilchrist, 15 Johns. 89, 109; Fowler *v.* Shearer, 7 Mass. 14; Manchester *v.* Hough, 5 Mason, 67; Durant *v.* Ritchie, 4 Mason, 45; Page *v.* Page, 6 Cush. 196.

[4] Shepard *v.* Shepard, 7 Johns. Ch. 57; Bunch *v.* Bunch, 26 Ind. 400.

[5] Adams *v.* Palmer, 51 Me. 478, 488.

tion, by erecting buildings or making improvements thereon, the law will presume he intended it for her benefit, and he cannot recover for the same.[1]

§ 538. **Husband's Rights upon Wife's Death.** — The rights of the husband as tenant by curtesy, where the wife dies after having had issue, and leaving lands of inheritance, have been considered in a former chapter. But if the wife die without having had issue, nothing remains to the husband, as against the claims of her heirs-at-law, except the right of emblements.[2]

§ 539. **Husband's Liability for Waste.** — A husband holding his wife's estate of inheritance by marital right is tenant for life with a reversion in the wife. As such he would be liable for waste like other tenants for life, if it were not that a wife could not maintain such an action against her husband. If, however, he conveys his freehold to a stranger, who commits waste, the action lies; so if the husband's estate is levied upon by his creditors and they commit waste; and the husband and wife may join in an action for such an injury. And chancery will interpose by way of injunction against the husband while he is tenant, to prevent his committing waste.[3] *

* Note. — From the statutes of the several States in relation to the rights of married women to control their own lands during coverture, the following digest of State and Territorial provisions concerning the real estate of married women has been compiled: — *Alabama:* All property of the wife, whether obtained before or after marriage, is her separate estate and is not subject to the liabilities of her husband. Unless the husband be incapacitated by imprisonment, insanity, etc., he must join in all deeds of conveyance, but the wife may dispose of her separate estate by will. Code 1896, §§ 2520–38. *Alaska:* All real or personal property acquired by a wife during coverture by her own labor shall not be liable for the debts, contracts, or liabilities of her husband; but shall be exempt from his control as is property owned at the time of marriage or thereafter acquired by gift, devise, or inheritance. 23 U. S. Stat. at Large, ch. 53, § 7. *Arizona:* All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase, rents, issues, and profits of the same, shall be her separate property and subject to her contracts if she is not a minor. Rev. Stat. 1887, § 2100. *Arkansas:* The real and personal property of any *feme covert*, acquired in any manner whatever, either before or after marriage, is her separate estate so long as she chooses to have it remain so. It is not subject to the debts of the husband, and may be disposed of in any way by the wife as if she

[1] 1 Roper, Hus. & Wife, 54; Washburn v. Sproat, 16 Mass. 449.

[2] Barber *v.* Root, 10 Mass. 260; 2 Kent, Com. 131.

[3] Babb *v.* Perley, 1 Me. 6; 2 Kent, Com. 131.

were a *feme sole.* No contract which she may make in respect to her sole and separate property will render the husband or his property in any way liable therefor. Digest of Statutes, 4940, 4947. *California:* All property of the wife, owned by her before marriage, and that acquired afterward by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property, which she may convey without the consent of her husband. All property not acquired as the separate property of either husband or wife is community property, over which the husband has absolute power of disposition, except that he cannot convey it without a valuable consideration unless the wife in writing consents thereto. Civil Code 1899, §§ 162, 163, 172, 687. *Colorado:* Whatever property a woman may own at the time of her marriage, and any property which may come to her by gift, from any person except her husband, devise, descent, or bequest, remains her sole and separate property, and is not subject to the disposal of her husband, or liable for his debts. General Statutes 1883, § 3007. *Connecticut:* In case of marriages on or after April 20, 1877, neither husband nor wife shall acquire, by force of the marriage, any right to or interest in any property held by the other before, or acquired after, such marriage, except as to the share of the survivor in the property, as provided by law (§§ 623–625). The wife shall have power to make contracts with third persons, and to convey to them her real and personal estate, as if unmarried, but in no case shall the same be liable to be taken for the debts of the husband. General Statutes 1888, § 2796. *Delaware:* The real and personal property of a wife, acquired before or after coverture, is held as her sole and separate estate, nor can the same in any way be subjected to the control of the husband. With his consent she may dispose of her estate in any manner, subject only to the husband's right to curtesy. Laws 1874, ch. 550, §§ 1, 4. *District of Columbia:* The right of any married woman to property, real or personal, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried. She may dispose of said property, or may contract and sue or be sued in relation to it, in the same manner and with like effect as if she were unmarried. Compiled Statutes 1889, ch. 30, §§ 23–25. *Florida:* All property, real and personal, of a wife, owned by her before marriage, or thereafter lawfully acquired, remains her separate property, and is not liable for the debts of the husband without her consent given by some instrument in writing executed according to the law respecting conveyances by married women. Said property shall remain in care and management of the husband, who shall join with the wife in all transfers and conveyances of the same. Revised Statutes 1892, §§ 2070, 2071. *Georgia:* A woman's estate, on marriage, continues independent of her husband and is not subject to his liabilities. This is also true of all property given to, inherited, or acquired by the wife during coverture. Code 1895, §§ 2476, 5790. Since 1866 she may make a valid will of her separate property, whether real or personal, without the consent of her husband. Urquhart *v.* Oliver, 56 Ga. 344. A wife may convey her realty by an ordinary deed of conveyance. Brown *v.* Kimbrough, 55 Ga. 41. *Idaho:* All property of the wife, owned before marriage or afterwards acquired by gift, bequest, devise, or descent, is her separate property and is not liable for husband's debts. All other property acquired after marriage, including rents and profits of separate property, unless otherwise expressly provided, is community property of husband and wife. The husband must join in any alienating any part of the said separate property, and the wife must make a separate acknowledgment of said conveyance. Revised Statutes 1887, §§ 2494–98. *Illinois:* A married woman may own, in her own right, real and personal property

obtained by descent, gift, or purchase, and manage, sell, and convey the same to the same extent and in the same manner that the husband can property belonging to him; but no conveyance between husband and wife shall be valid as against third parties unless the same be in writing, and acknowledged and recorded in the same manner as a chattel mortgage. The wife is entitled to her earnings, and is liable on contracts, and may sue or be sued, as if she were unmarried; however, she may not carry on partnership business without the husband's consent, unless he has abandoned her or is incapacitated. Revised Statutes 1899, ch. 68, §§ 1–10. *Indiana:* Lands of a married woman and profits therefrom shall be her separate property as fully as if she were unmarried, nor shall the same be liable for the debts of her husband, but she has no power to incumber or convey such lands, except by deed in which her husband joins. This law applies whether the property, real or personal, be acquired by conveyance, gift, devise, or descent, or by purchase with her separate means. The wife may devise her separate property without concurrence of the husband. Statutes 1894, §§ 6961, 6962, 2726. *Iowa:* A married woman may own in her own right real and personal property, acquired by descent, gift, or purchase, and manage, sell, and convey the same, and dispose thereof by will, to the same extent and in the same manner as the husband can property belonging to him. Code 1897, § 3153. *Kansas:* Property, real and personal, owned at time of marriage, and that afterwards acquired by the wife by descent, devise, or bequest, or gift from any person except her husband, remains her sole and separate property and is not subject to liabilities of the husband. The wife may sell, convey, or contract as to the same as if a *feme sole*, but may not bequeath away more than one half of the property without the consent of the husband in writing. General Statutes 1897, ch. 110, §§ 34, 35; ch. 123, § 13. *Kentucky:* Marriage shall give to the husband, during the life of the wife, no interest or estate in the wife's property, real or personal, owned at the time or acquired after the marriage, and the same shall be free from his liabilities. The wife may sell her personal property, but the husband must join in any contract to sell, convey, or mortgage her real estate. She may dispose of her estate by will. Statutes 1894, §§ 2127, 2128, 2148. *Louisiana:* The wife, whether separated in property by contract or judgment, or not separated, cannot, except by and with the authorization of the husband, and in default of the husband, with that of the judge, alienate her immovable effects of whatever nature they may be, except in cases where the alienation of the dotal immovable is permitted; nor can she bind herself for the debts of the husband contracted before or during marriage. The wife may make her last will without the authority of the husband. Code 1900, §§ 135, 2397–98. *Maine:* A married woman, of any age, may own in her own right, real and personal estate, acquired by descent, gift, or purchase; and may manage, sell, convey, and devise the same by will, without the joinder or assent of her husband. Property conveyed to her by the husband without a valuable consideration may be taken to pay his debts. Statutes 1885–1895, ch. 61, § 1. *Maryland:* The property, real and personal, belonging to a woman at the time of her marriage, and all property which she may acquire or receive after her marriage, by purchase, gift, grant, devise, bequest, descent, or in course of distribution, shall be protected from the debts of her husband, and she shall hold said property for her separate use, with power of devising the same as fully as if she were a *feme sole;* or she may convey the same by a joint deed with her husband. However, no acquisition of property from the husband shall be void if prejudicial to rights of creditors. Code 1878, art. 51, §§ 19, 20. *Massachusetts:* The property, both real and personal, which any mar-

ried woman owns as her sole and separate property, and that which comes to her by descent, bequest, gift, or grant, or from trade, labor, business, or services, together with the property which a woman owns at the time of her marriage, with the rents, issues, profits, and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and as such shall not be subject to the control of the husband or liable for his debts. To convey any of said property the wife must have an order from the supreme judicial, superior, or probate court, or the husband must give his consent in writing, or join in the deed. Husband and wife may, by their joint deed, convey the real estate of the wife which is not her separate property, but the wife shall not be bound by any covenant contained in such joint deed. A married woman may make a will of her real and separate personal estate, in the same manner as if she were sole, but such will shall not operate to deprive her husband of more than one half of her personal property, without his consent in writing. Statutes 1860, ch. 108, §§ 1, 2, 3, 9. When land is conveyed to a married woman and she mortgages it at the same time, the husband shall not have an estate by curtesy as against the mortgagee. Supplements 1874, ch. 184, § 2. *Michigan*: Any real or personal estate which may have been acquired by any female before her marriage, either by her own personal industry, or by inheritance, gift, grant, or devise, or which after marriage she thus acquires, and the rents, profits, and income of any such real estate, shall be and continue the real and personal estate of the wife to the same extent as before marriage; and none of said property shall be liable for debts of the husband, but shall be liable for debts of the wife contracted before marriage. The wife cannot convey said property without the consent of the husband, except by an order from the judge of probate or county court. Statutes 1882, § 6288. *Minnesota:* All property, real, personal, and mixed, owned by any married woman, or owned or held by any woman at the time of her marriage, together with all the rents, issues, and profits thereof, shall continue to be her separate property notwithstanding such marriage, and the same shall be free from the control of the husband, and from any liability for his debts. The husband must join in conveyances. Statutes 1891, §§ 3865–66. *Mississippi:* Married women are fully emancipated from all disability on account of coverture; and the common law, as to the disabilities of married women and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and to do all acts in reference to property which she could lawfully do if she were not married. Code 1892, ch. 61, § 2289. *Missouri:* The real and personal property which a woman has at time of marriage and that afterwards acquired by gift, bequest, inheritance, or purchase, together with profits thereof, remains her separate property, free from the control of the husband or liability on his account. Both husband and wife join in conveyances. Revised Statutes 1899, §§ 901 and 4340. *Montana:* All property of the wife owned before her marriage and that acquired afterwards is her separate property. The wife may, without the consent of her husband, convey her separate property, or execute a power of attorney for the conveyance thereof. Code 1895, § 220. *Nebraska:* Property, real and personal, owned by a woman at marriage, together with profits thereof and that afterwards acquired in any manner except by gift or devise from her husband, remains her sole and separate property, and is not subject to the disposal of the husband or liable for his debts. A wife, while the married relation exists, may bargain, sell, and convey her real and personal property to the same extent and with the same effect as a married man. Statutes 1899,

§§ 3659–60. *Nevada:* All property of the wife owned before marriage and afterwards acquired by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property, and she may, without the consent of her husband, convey, charge, incumber, or otherwise in any manner dispose of said property. Statutes 1885, §§ 499 and 507. *New Hampshire:* Every woman shall hold to her own use, free from the interference or control of her husband, all property she may have earned or acquired by inheritance, bequest, gift, or conveyance, either before or after marriage, providing such acquisitions were not occasioned by payment or pledge of property of the husband. A married woman of full age may convey her real estate, and if not of full age may join with her husband in release of dower. Statutes 1901, ch. 176, §§ 1–3. *New Jersey:* Wife retains as her sole and separate property, all property, real or personal, which she owns at the time of marriage or acquires during marriage, and although the same is not subject to the disposal or control of the husband, he must nevertheless join in all conveyances. The wife may make a valid will, but cannot prejudice thereby the interests of her husband in her real property. Statutes 1895, section on Married Women, §§ 1, 2, 3, 9, 14, and 15. *New Mexico:* All property owned by a woman continues as her separate property notwithstanding marriage, and shall be free from any liability on account of the husband. Unless the husband be an insane person, he must join in all conveyances. Compiled Laws 1897, §§ 1509–10. *New York:* Property, real or personal, owned by a woman at the time of her marriage, or afterwards acquired by her, and the rents, issues, proceeds and profits thereof, continues to be her sole and separate property as if she were unmarried, and not subject to her husband's control or disposal nor liable for his debts. She has all the rights in respect to said property, real or personal, and the acquisition, use, enjoyment, and disposition thereof, and to make contracts in respect thereto with any person including her husband, as if she were unmarried. Revised Statutes 1896, ch. 48, §§ 20–21. *North Carolina:* No real estate belonging to a woman at time of marriage or afterwards acquired may be sold or leased by the husband without the consent of the wife evidenced by deed with separate examination, and no interest of the husband in said property shall be subject to sale on execution. The wife may make a will, but cannot deprive her husband of curtesy except in cases of divorce or abandonment. Code 1883, §§ 1839–40. *North Dakota:* The wife after marriage has with respect to property, contracts, and torts the same capacity and rights, and is subject to the same liabilities as before marriage. Except as to support, neither has any interest in the property of the other. Tenancy by curtesy and estate in dower are abolished. Revised Codes 1895, §§ 2765–71. *Ohio:* If the husband is unable to support himself, wife, and family by his labor or property, the wife must assist him so far as she is able, but aside from this neither has any interest in the property of the other except the respective rights to curtesy and dower. Accordingly a married person may take, hold, and dispose of property, real or personal, the same as if unmarried. Revised Statutes 1896, §§ 3110–14, 4188. *Oklahoma:* If the husband is unable to support his wife and has not deserted her, she must support him out of her separate property, but otherwise neither husband nor wife has any interest in property of the other, and accordingly the wife may convey her separate property without husband's consent. A woman retains the same legal personality after marriage as before. Statutes 1893, ch. 40, §§ 3–5, 15. *Oregon:* The property of a married woman at the time of her marriage or afterwards acquired by gift, devise, or inheritance is not subject to the debts of her husband, and she may manage, sell, convey, or devise the same to the same extent

and in the same manner that her husband can property belonging to him. The husband must join in conveyances. Laws 1887, §§ 2992, 3003. *Pennsylvania:* A married woman has the same right and power as an unmarried person to acquire, own, possess, control, use, lease, sell, or otherwise dispose of property of any kind, real, personal, or mixed, and either in possession or expectancy, and may exercise the said right and power in the same manner and to the same extent as an unmarried person, but she may not mortgage or convey her real property unless her husband join in such mortgage or conveyance. A wife may dispose of her property, real and personal, by last will and testament, in writing, in the same manner as if she were unmarried, provided she does not affect the husband's right as tenant by the curtesy. Pepper & Lewis' Dig. 344, §§ 1, 5. *Rhode Island:* Property owned by any woman before marriage or which may become her property after marriage, and all the proceeds of the same, remain her sole and separate property free from the control of her husband. If twenty-one years of age or over, a wife may by will dispose of her property, real and personal. General Laws 1896, ch. 194, §§ 1, 8, 9. *South Carolina:* The real and personal property of a married woman, whether held by her at the time of her marriage or accrued to her thereafter, with the earnings and income thereof, shall not be subject to levy and sale for her husband's debts, but shall be her separate property, which she may bequeath, devise, or convey in the same manner and to the same extent as if she were unmarried. Tenancy by curtesy is abolished. Revised Statutes 1893, ch. 82, art. 2, §§ 2164–66, 2169. *South Dakota:* A woman retains the same legal existence and legal personality after marriage as before marriage, and her husband has no interest in her property save a right to be supported if he is unable to provide for himself. Statutes 1899, §§ 3499, 3500, 3511. *Tennessee:* The interest of the husband in the real estate of his wife, acquired by her either before or after marriage, by gift, devise, descent, or in any other mode, may not be disposed of on an execution against him, nor may the husband sell his wife's real estate during her life without her joining in the conveyance. The powers of married women to sell, convey, devise, charge, or mortgage their real estate do not depend upon the concurrence of the husband or his consent thereto. Code 1896, §§ 4234, 4243. *Texas:* All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife; but during the marriage the husband shall have the sole management of all such property. Statutes 1879, § 2851. *Utah:* The real and personal estate of every female, acquired before marriage and all the property to which she may afterwards become entitled by purchase, gift, grant, inheritance, or devise, shall be and remain the estate and property of such female, and shall not be subjected to the liabilities of the husband, and may be conveyed, devised, or bequeathed by her as if she were unmarried. Revised Statutes 1898, § 1198. *Vermont:* A married woman shall not become surety for her husband's debts except by way of mortgage, and shall not convey or mortgage her real estate except by deed duly executed by herself and husband. A husband and wife may, by their joint deed, convey the real estate of the wife, as she might do by her separate deed if unmarried. The wife may be authorized by the chancellor to sell her property when living apart from her husband. Statutes 1894, §§ 2209, 2543, 2646, 2650. *Virginia:* All real and personal property to which a woman is entitled at the time of her marriage, and that acquired during coverture, and all the increase thereof, continues her separate estate and is not subject to the use, control, disposal, debts, or liabilities of

her husband. The husband is entitled to curtesy, but aside from this the wife may incumber, convey, devise, bequeath, or otherwise dispose of her said separate estate as if unmarried. Code 1887; Statutes, §§ 2284–86. *Washington:* Property of a married woman at the time of her marriage or afterwards acquired by gift, devise, or inheritance, with issues and profits thereof, shall not be subject to the debts of her husband, and she may manage, lease, sell, convey, incumber, or devise by will such property to the same extent and in the same manner that her husband can property belonging to him. Code 1881, § 2400. *West Virginia:* Any married woman may take property by inheritance, gift, grant, devise, or bequest, and hold to her sole and separate use; and convey and devise real and personal property, or any interest or estate therein, in the same manner and with like effect as if she were a single woman, and the same shall in no way be subject to the control of her husband, nor liable for his debts. Code 1891, ch. 66, § 2. *Wisconsin:* Wife may receive property by inheritance, gift, grant, devise, or bequest from any person other than her husband, and hold the same to her sole and separate use; and may convey and devise real and personal property, or any interest therein, with rents, issues, and profits thereof, as if she were unmarried, and the same shall not be subject to the disposal of the husband, nor liable for his debts. Sanborn & Berryman's Ann. Stat. ch. 108. *Wyoming:* All property owned by a woman at the time of her marriage or afterwards acquired in good faith from any person other than her husband, with rents, issues, increase and profits thereof, remains, during coverture, her sole and separate property under her sole control as though she were unmarried, and shall be exempt from liability for the debts of her husband. Any woman may, while married, make a will the same as though she were sole. Revised Statutes 1899, §§ 2972–75.

CHAPTER XVIII.

HOMESTEAD RIGHTS.

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§ 540. **Nature of the Homestead Right.** — [The right of homestead is purely the creation of statutes, which have no extra-territorial force. It is generally spoken of as an estate in land and treated as an estate for life or an estate by marriage. But it is submitted that, while the homestead right possesses some of the incidents of an estate, it is rather a protection to an estate than an estate itself. For, as will be shown, it is the policy of homestead laws to extend this protection to any estate which the homesteader has in the land, even a chattel interest. It protects the homesteader's estate against forced sale in favor of creditors, but affords no protection to his title as against paramount claimants. Nor, in general, is the right dependent upon marriage. Generally, the protection to the estate is absolute in favor of the homesteader's alienee, and frequently by express provision it extends, as against the homesteader's creditors, to his heirs, whether they, in their own right, are entitled to claim homestead rights or not. It will generally be found, however, that, while the homesteader may convey the homestead free from the claims of his creditors, if he dies entitled to homestead, the rights of creditors

attach, but are postponed in favor of the widow and minor children.[1] In a few States the lien of a judgment will attach to the land, the enforcement of the judgment being merely postponed in favor of the occupation of the land by the homesteader in favor of his surviving wife and minor children. Nowhere is the exemption a protection against claims for purchase-money and taxes, and in some States the class of claims against which protection is afforded is very restricted.

§ 541. **Existing Creditors protected.** — As the Federal Constitution inhibits the States from passing any law impairing the obligation of a contract, and as the remedy afforded by law at the time of the making of a contract enters into and forms a part thereof, no State can enact an exemption law which will be valid as against the enforcement of damages for the breach of any pre-existing contract.[2]

§ 542. **Rights of Action and Judgments founded on Torts not protected.** — But a judgment is not a contract within the inhibition of the Federal Constitution;[3] therefore, although a State may not impair the obligation of a judgment founded upon a contract, — for that would be to impair the obligation of such contract, — it may abridge the right to enforce a judgment founded on tort. A homestead exemption act is therefore valid as against tort judgments existing at the time of

[1] The right to devise lands, the right to convey lands in fee, and the right of the creditor to sell the debtor's lands to satisfy his debt, are all of statutory origin. The establishment of none of these rights was ever held to have created a new estate. It is difficult to see how any new limitations or conditions imposed upon the exercise of these statutory rights could result in the creation of an estate not known to the common law. See McDonald *v.* Crandall, 43 Ill. 231.

[2] Gunn *v.* Barry, 15 Wall. 610; Johnson *v.* Fletcher, 54 Miss. 628; The Homestead Cases, 22 Gratt. 266; Cunningham *v.* Gray, 20 Mo. 170; Chambliss *v.* Jordan, 50 Ga. 81; Clarke *v.* Trawick, 56 Ga. 359; Hawks *v.* Hawks, 64 Ga. 239; Lessley *v.* Phipps, 49 Miss. 790; *Ex parte* Hewett, 5 S. C. 409; Cochran *v.* Darcy, id. 125; Wilson *v.* Brown, 58 Ala. 62; Nelson *v.* McCrary, 60 Ala. 301; Preiss *v.* Campbell, 59 Ala. 635; Corr *v.* Shackelford, 68 Ala. 241; Harris *v.* Austell, 2 Baxt. 148; Leonard *v.* Mason, 1 Lea, 384; Hannum *v.* McInturf, 6 Baxt. 225; Alexander *v.* Kilpatrick, 14 Fla. 450; Hannahs *v.* Felt, 15 Iowa, 141; Ryan *v.* Wessels, id. 145; Martin *v.* Kirkpatrick, 30 La. Ann. Pt. 2, 1, 214; Cole *v.* La Chambre, 31 La. Ann. 431; McClenaghan *v.* McEachern, 47 S. C. 446; s. c. 25 S. E. Rep. 296; Edwards *v.* Kearzey, 96 U. S. 595; Dunn *v.* Stevens, 62 Minn. 380; s. c. 64 N. W. Rep. 924.

[3] Louisiana *ex rel. v.* Mayor of New Orleans, 109 U. S. 285.

the passage of the act.[1] And, *a fortiori*, such acts are valid as against mere rights of action for torts.[2]

§ 543. **Exemption a Vested Right not to be impaired.** — The homestead character once having attached to the land, the exemption cannot be removed or abridged by any subsequent act of the legislature, without the consent of the homesteader. Thus, where one is entitled to claim an exemption of a certain number of acres in the country, or a much smaller area in an incorporated city or town, the homestead character which has been impressed upon a tract in the country is not affected by the subsequent incorporation of the tract, without the consent of the homesteader, within the limits of a city or town;[3] although the homesteader may abridge his own right by changing the character of the property from rural to urban, as by plotting and offering it for sale in lots.[4]

§ 544. **Construction of Homestead Acts.** — While some of the courts, in their earlier decisions, were inclined to give a strict construction to exemption laws, as being in derogation of the common law,[5] it seems now to be a generally accepted rule that, being founded upon considerations of public policy,[6] they are to be construed liberally in favor of their beneficent purposes.[7] Indeed, exemption laws, whatever may be said of their policy, are not in derogation of the common law, but are simply restrictive of statutes passed in derogation of the

[1] McAfee *v.* Covington, 71 Ga. 272; and see Freeland *v.* Williams, 131 U. S. 405.

[2] Parker *v.* Savage, 6 Lea, 406.

[3] Smyth on Homesteads, 69, 70; Galligher *v.* Smiley, 28 Neb. 189; s. c. 44 N. W. Rep. 187; Taylor *v.* Boulware, 17 Tex. 74; Kiewert *v.* Anderson, 65 Minn. 491; s. c. 67 N. W. Rep. 1031.

[4] See cases *supra*.

[5] Rew *v.* Alter, 5 Denio, 119; Olson *v.* Nelson, 3 Minn. 53.

[6] Robinson *v.* Wiley, 15 N. Y. 489; Franklin *v.* Coffee, 18 Tex. 413; Wassell *v.* Tunnah, 25 Ark. 101.

[7] McDougall *v.* Meginnis, 21 Fla. 362; Deere *v.* Chapman, 25 Ill. 610; Kiewert *v.* Anderson, 65 Minn. 491; s. c. 67 N. W. Rep. 1031; Keyes *v.* Cyrus, 100 Cal. 322; s. c. 34 Pac Rep. 722; Mitchelson *v.* Smith, 28 Neb. 583; s. c. 44 N. W. Rep. 871; Riggs *v.* Sterling, 60 Mich. 643; s. c. 27 N. W. Rep. 705; White *v.* Fulghum, 87 Tenn. 281; s. c. 10 S. W. Rep. 501; Richardson *v.* Buswell, 10 Met. 506; Montague *v.* Richardson, 24 Conn. 338; Robinson *v.* Wiley, 15 N. Y. 489; Frost *v.* Shaw, 3 Ohio St. 270; Favers *v.* Glass, 22 Ala. 621; Wade *v.* Jones, 20 Mo. 75; Wilson *v.* Oldham, 12 B. Mon. 55; McKenzie *v.* Murphy, 24 Ark. 155; Barney *v.* Leeds, 51 N. H. 253, 275.

common law.[1] But, however liberal the rule of construction, "courts will not annex to such statutes consequences not fairly within their purview or intent."[2]

§ 545. **Definition of Homestead.** — A homestead is the home or permanent place of residence of the person claiming the benefit of the act, and it includes the land about and contiguous to his dwelling to the extent allowed by the act. It must not be a mere investment in land. But it will not lose its character by the owner's temporary absence, without intention to abandon it as a home.[3] Mere intention to make a home, however, is not enough to impress the homestead character.[4] The use as a home must coexist with the intention that it shall be a home.[5] As to whether or not the land must not only be contiguous to the dwelling lot but must be held in the same right, the authorities are not in accord. Upon the liberal principles of construction applied to these acts, it would seem that the inquiry ought to be confined to the question, Is the land in actual use and occupation as a part of the home? And this is the law in several States;[6] but in Vermont the dwelling-house must be on the land sought to be exempted and not on a contiguous tract.[7]

§ 546. **Treatment of the Subject.** — The law of homestead exemptions is so entirely dependent upon statute that it would be impossible, within the scope of this work, to go into the details of the laws of the various States, differing as they do

[1] 3 Bl. Com. 418.

[2] Wright *v.* Whittick, 18 Colo. 54; s. c. 31 Pac. Rep. 490; Briant *v.* Lyons, 29 La. Ann. 64; Brannin *v.* Womble, 32 La. Ann. 805.

[3] Franklin *v.* Coffee, 18 Tex. 413; Scott *v.* Dyer, 60 Tex. 135; Tumlinson *v.* Swinney, 22 Ark. 400; Gregg *v.* Bostwick, 33 Cal. 220; Galligher *v.* Smiley, 28 Neb. 189; s. c. 44 N. W. Rep. 187; Phelps *v.* Rooney, 9 Wis. 70; Barney *v.* Leeds, 51 N. H. 253; Davis Andrews, 30 Vt. 678; Euper *v.* Alkire, 37 Ark. 283; Robinson *v.* Swearingen, 55 Ark. 55; s. c. 17 S. W. Rep. 365; and see other Texas cases defining homestead, *post*, § 588.

[4] Holden *v.* Penney, 6 Cal. 235; Walters *v.* The People, 21 Ill. 178; Wisner *v.* Farnham, 2 Mich. 472; Christy *v.* Dyer, 14 Iowa, 438; Givans *v.* Dewey, 47 Iowa, 414; Coolidge *v.* Wells, 20 Mich. 79.

[5] Fort *v.* Powell, 59 Tex. 321.

[6] See *post*, § 571; Mason *v.* Columbia Finance & Trust Co., 99 Ky. 117; s. c. 35 S. W. Rep. 115; McClenaghan *v.* McEachern, 47 S. C. 446; s. c. 25 S. E. Rep. 296; Lowell *v.* Shannon, 60 Iowa, 713; s. c. 15 N. W. Rep. 566.

[7] See *post*, § 590.

in the extent of the exemption, the character of the property exempted, the persons entitled to the benefit, and the mode of selection. It is proposed, therefore, to consider the general principles which may fairly be said to run as a thread through all homestead exemption laws, together with the salient features of the law of each individual State and Territory; leaving the reader who wishes to extend his inquiries further to consult the statutes and the various valuable monographic works on the subject.

§ 547. "Head of a Family." — Nearly every act names the "head of a family" as entitled to the homestead right. The meaning placed upon this term is a liberal one. It seems to apply to any person, man or woman, married or unmarried, upon whom is cast the moral obligation of providing for the support of one or more other persons and with whom he or she resides in the family relation. Thus, an unmarried man, with whom reside his widowed sister and her children, whom he supports;[1] an unmarried man whose mother is the sole member of his family;[2] an unmarried woman who has the children of a deceased sister living with her;[3] are entitled to be considered heads of families. The members of the family need not all eat under one roof, or be employed about the house.[4] Nor need the members of the family all live under one roof if there is the legal duty to support: it is the relation and the dependence on that relation, and not the aggregation of the individuals, that constitute a family.[5] On the other hand, while a mere moral obligation to support will make a man the head of a family if the dependents reside with him, the moral obligation will not suffice if the dependents do not reside with him, even though he actually support them. If they do not live together, there must exist a legal duty to support.[6] Mere temporary support afforded to guests is not sufficient;[7] and the obligation to support must not arise

[1] Wade *v.* Jones, 20 Mo. 75.

[2] Parsons *v.* Livingston, 11 Iowa, 104.

[3] Arnold *v.* Waltz, 53 Iowa, 706; s. c. 6 N. W. Rep. 40. So an unmarried woman with an illegitimate child. Ellis *v.* White, 47 Cal. 73.

[4] Poor *v.* Hudson Insurance Co., 2 Fed. Rep. 432.

[5] Sallee *v.* Waters, 17 Ala. 482; Marsh *v.* Lazenby, 41 Ga. 153.

[6] Jones *v.* Gray, 3 Woods, 494.

[7] Whitehead *v.* Nickelson, 48 Tex. 517.

out of contract alone as distinguished from obligation arising out of "dependence;" so that an unmarried man keeping house with servants, but having no other persons dependent upon him, would not have a family within the meaning of the act.[1] Where the legal obligation is relied upon, it must be fulfilled; thus, a husband separated from his wife, not contributing to her support, and not otherwise entitled, is not within the meaning of the term.[2] But while the existence of the family is necessary to the acquisition of the homestead right, it would seem, under the liberal construction given to these acts, that the right, once having been acquired, will not be destroyed by the mere breaking up of the family and removal of all of its members except the homesteader himself; provided he still continue to occupy the premises as a home.[3] But were he now to abandon the premises, he could not acquire a homestead again without re-establishing the family relation.[4]

§ 548. **Who entitled to Homestead in Alabama.** — The exemption extends to every resident of the State during life and occupancy, and if he leave surviving him a wife or minor child or children, or either, it continues during the life of the wife and minority of the child or children.[5] The right is not confined to "heads of families;" but husband and wife cannot each claim the right in separately owned tracts.[6] The exemption will continue during the minority of an adopted child.[7]

§ 549. **In Alaska** there is no homestead exemption.

§ 550. **Who entitled in Arizona.** — The exemption extends to

[1] Calhoun *v.* Williams, 32 Gratt. 18; Harbison *v.* Vaughan, 42 Ark. 539.

[2] Linton *v.* Crosby, 56 Iowa, 386. But see *contra*, Yates *v.* Steele, 48 Ark. 539; s. c. 4 S. W. Rep. 53. In this case it was not necessary for the court to arrive at its decision through this construction; for the exemption in Arkansas enures to married residents as well as heads of families. See *post*, § 551.

[3] Barney *v.* Leeds, 51 N. H. 253; Silloway *v.* Brown, 12 Allen, 30; Taylor *v.* Boulware, 17 Tex. 74; Kessler *v.* Draub, 52 Tex. 575; Wilkinson *v.* Merrill, 87 Va. 513; s. c. 12 S. E. Rep. 1015; Towne *v.* Rumsey, 5 Wyo. 11; s. c. 35 Pac. Rep. 1025; Stanley *v.* Snyder, 43 Ark. 429; Kimbrel *v.* Willis, 97 Ill. 494; Stults *v.* Sale, 92 Ky. 5; s. c. 17 S. W. Rep. 148.

[4] Whitehead *v.* Nicholson, 48 Tex. 528.

[5] Civ. Code (1896), 2033.

[6] Beard *v.* Johnson, 87 Ala. 729; s. c. 6 So. Rep. 383.

[7] Cofer *v.* Scroggins, 98 Ala. 342; s. c. 13 So. Rep. 115.

every person who is the head of a family.[1] It enures to the benefit of a surviving spouse, and upon the death of the survivor the minor child or children have the benefit of the act.[2]

§ 551. **Who entitled in Arkansas.** — The exemption extends to any resident of the State who is married or is the head of a family,[3] without regard to sex.[4] The owner dying without children, the right will continue to the widow for her natural life, if she has no separate homestead in her own right; and, in any case, it will continue during the minority of the children.[5] The exemption is not confined to citizens, but extends to resident aliens.[6] One merely intending to make a home is not entitled to claim under the act, but temporary absence, *animo revertendi*, does not affect the right if it has vested.[7] The exemption may be claimed by a married man, although his wife has abandoned him and he has no one else dependent on him;[8] but not by partners in the partnership property as against partnership creditors.[9]

§ 552. **Who entitled in California.** — Any person, to the value of $1,000, or any head of a family, to the value of $5,000, may select and claim a homestead. Heads of families specifically include a husband; every person who has residing on the premises with him or her, and under his or her care and maintenance, his or her minor child, the child of his or her deceased wife or husband, a minor brother or sister, the minor child of a deceased brother or sister; a father, mother, grandfather, or grandmother; the father, mother, grandfather, or grandmother of a deceased husband or wife; an unmarried sister, or any other of the before-mentioned relatives who,

[1] Rev. Stat. (1887) § 2071.

[2] Ibid. § 2077.

[3] Sandels & Hill's Dig. (1894) § 3710.

[4] Thompson *v.* King, 54 Ark. 9; s. c. 14 S. W. Rep. 925.

[5] Sandels & Hill's Dig. §§ 3694, 3695.

[6] McKenzie *v.* Murphy, 24 Ark. 155. This decision illustrates the liberal construction given to homestead acts. It held, under an old act in favor of "every free white citizen" (Gould's Dig. c. 68, § 29), that the word "citizen" was to be construed, in view of the liberal policy of the act, to include "domiciliated foreigners."

[7] See *ante*, § 545.

[8] Yates *v.* Steele, 48 Ark. 539; s. c. 4 S. W. Rep. 53.

[9] Richardson *v.* Adler, 46 Ark. 43. Partnership property is a trust fund for the benefit of the partnership creditors. Story's Eq. Jur. § 1253.

having attained the age of majority, are unable to take care of themselves.[1] If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other than the statutory liabilities; in other cases, the land goes to the homesteader's heirs or devisees, subject to the power of the superior court to assign the same for a limited time to the family of the decedent, subject in no case to any but special statutory liabilities.[2]

§ 553. **Who entitled in Colorado and Illinois.** — In these States the exemption is in favor of every householder who is the head of a family (in Illinois, the reading is "every householder *having* a family"), and after death it continues for the benefit of the surviving husband or wife or minor children.[3] The homestead must be the home in fact;[4] but in the case of the widow and children of a homesteader, actual residence is not indispensable.[5] Such exemption continues even after the death of the wife and children.[6] A wife also may be a householder, and, if separated from her husband, and not supported by him, can acquire a homestead in land bought by her.[7]

§ 554. **Who entitled in Connecticut.** — The exemption may be claimed by any person owning and actually occupying as a dwelling any building. Upon the death of the homesteader the protection covers the occupation of the property by the surviving husband or wife during life, or by the minor children during minority.[8]

§ 555. **In Delaware and in the District of Columbia** there appears to be no right of homestead.

[1] Civ. Code (1885), § 1261 ; Revalk *v.* Kraemer, 8 Cal. 66; Ellis *v.* White, 47 Cal. 73. Head of a family, see *ante*, § 547.

[2] Ibid. § 1265. Compare also the laws of Montana and Nebraska (*post*, § 573), and Washington (*post*, § 592).

[3] Mills' Ann. Stat. of Col. (1891) §§ 2132, 2135 ; R. S. of Ill. (1895) c. 52, §§ 1, 2. Head of a family, see *ante*, § 547. Wife may have the character of head of a family for the purposes of this act, although living with her husband. McPhee *v.* O'Rourke, 10 Colo. 301 ; s. c. 15 Pac. Rep. 420.

[4] Kitchell *v.* Burgwine, 21 Ill. 40.

[5] Vanzant *v.* Vanzant, 23 Ill. 536; Cabeen *v.* Mulligan, 37 Ill. 230.

[6] Kimbrel *v.* Willis, 97 Ill. 494.

[7] Kenley *v.* Hudelson, 99 Ill. 493 ; Hotchkiss *v.* Brooks, 93 Ill. 386.

[8] Gen. Stat. (1888) § 2783.

§ 556. **Who entitled in Florida.** — The exemption extends to any head of a family residing in this State, and enures to the benefit of widow and heirs of the homesteader. The homestead may be alienated or mortgaged, or may be devised where there are no children, the grantee or devisee having the benefit of the homesteader's exemption.[1] The homestead of a decedent can never be assets for the payment of his debts; consequently, the person entitled dying intestate, his heirs have the absolute benefit of the ancestor's exemption, as heirs and not as survivors, absolutely without regard to their occupation of the property, or to their age or residence. The exemption protects the fee.[2]

§ 557. **Who entitled in Georgia.** — The exemption extends to every head of a family, or guardian or trustee of a family of minor children, or every aged or infirm person, or person having the care and support of dependent females of any age, who is not the head of a family.[3] The guardian of one minor is within the act;[4] but a wife is not entitled to a homestead out of her own property, her husband being alive,[5] and no females being dependent on her, unless she is separated from her husband,[6] or unless her husband is invalid and indigent and their minor daughters are dependent on her.[7] The exemption ends with removal of residence from the State.[8] And an exemption in favor of a minor female terminates upon her coming of age, although she be dependent.[9]

§ 558. **Who entitled in Idaho.** — In this regard, the law of Idaho is identical with that of California (*q. v.*).[10]

[1] Const. of 1885, art. 10, §§ 1, 2, and 4; First Nat. Bank of Fla. *v.* Ashmead, 23 Fla. 379; s. c. 2 So. Rep. 657; Purnell *v.* Reed, 32 Fla. 329; s. c. 13 So. Rep. 874. Head of a family, see *ante*, § 547.

[2] Miller *v.* Finegan, 26 Fla. 29; s. c. 7 So. Rep. 140; Scull *v.* Beatty, 27 Fla. 426; s. c. 9 So. Rep. 4.

[3] Code (1895), § 2827. Head of a family, see *ante*, § 547. The wife is not the head of a family of children of her husband by a former marriage. Lathrop *v.* The Soldiers L. & B. Asso., 45 Ga. 483.

[4] Rountree *v.* Dennard, 59 Ga. 629.

[5] Robson *v.* Walker, 74 Ga. 823.

[6] Bechtoldt *v.* Fain, 71 Ga. 495.

[7] Johnson *v.* Little, 90 Ga. 781; s. c. 17 S. E. Rep. 294.

[8] Knox *v.* Yow, 91 Ga. 367; s. c. 13 S. E. Rep. 654; Palmer *v.* Smith, 88 Ga. 84; s. c. 13 S. E. Rep. 956.

[9] Tate *v.* Goff, 89 Ga. 184; s. c. 15 S. E. Rep. 30.

[10] Rev. Stat. (1887) §§ 3058, 3059.

§ 559. **Who entitled in Illinois.** — See *ante*, § 553.

§ 560. **Who entitled in Indian Territory.** — The exemptions are the same as in the State of Arkansas (*q. v.*).

§ 561. **In Indiana**, although certain persons may hold real property as exempt to the amount of $600,[1] there is nothing in the nature of a homestead right.

§ 562. **Who entitled in Iowa.** — The exemption extends to the homestead of every family, whether owned by the husband or the wife;[2] and a surviving husband or wife is a "family" within the meaning of the act.[3] The residence of the head of the family is immaterial as long as the premises are actually occupied by the family as a home.[4] The exemption continues after death for the benefit of the surviving spouse, whether as life tenant of the whole or as distributee in fee, or for the benefit of heirs being "issue."[5] The wife's right as surviving spouse to occupy the homestead is a mere personal right and not an estate.[6]

§ 563. **Who entitled in Kansas.** — The act protects an owner whose residence is occupied by his family.[7] Upon the death of the homesteader, the estates of the widow and children are absolutely protected.[8]

§ 564. **Who entitled in Kentucky.** — The exemption extends to any debtor who is an actual *bona fide* housekeeper with a family residing in this Commonwealth,[9] and to the widow of such debtor as long as she continues to occupy the homestead, and to the unmarried children of the debtor until the youngest unmarried child arrives at full age. The termination of the widow's occupancy does not affect the right of the children.[10] In like manner, a wife may claim a homestead which

[1] Rev. Stat. (1894) § 715.

[2] Code (1897), § 2972.

[3] Ibid. 2973. And see *ante*, § 547. Intention to occupy is not sufficient. See *ante*, § 545.

[4] Savings Bank *v.* Kennedy, 58 Iowa, 454; s. c. 12 N. W. Rep. 479.

[5] Code, § 2985; Burns *v.* Keas, 21 Iowa, 257; Floyd *v.* Moseer, 1 Iowa, 512; Green *v.* Root, 62 Fed. Rep. 191.

[6] Mahaffy *v.* Mahaffy, 63 Iowa, 65; s. c. 18 N. W. Rep. 685.

[7] Gen. Stat. (1897) c. 118, § 1.

[8] Ibid. c. 109, 2

[9] Statutes (1894), § 1702.

[10] Ibid. § 1707.

shall be for the benefit of her surviving husband and children.[1] The existence of the family is necessary to the creation of the right, but not to its continuance.[2] A remainder-man cannot claim homestead in land occupied by the life tenant.[3] The occupation of the widow need not be personal: it may be by agent or tenant.[4] After the homesteader's death, the continuing protection is to those having the statutory right to occupy, and not to the inheritance; but this right to occupy is protected against the heirs[5] as well as against the creditors of the decedent.

§ 565. **Who entitled in Louisiana.** — The exemption may be claimed by any person, the head of a family, or one who has persons dependent on him or her for support, *bona fide* in the occupation of the land. It is continued for the benefit of the surviving spouse or minor child or children of the beneficiary.[6] Minor children who partly earn their own living are "dependent" persons.[7] Judgments against the homesteader are dormant liens which may be enforced as against the vendee.[8] *Bona fide* ownership and occupation are necessary to the existence of the homestead right.[9]

§ 566. **Who entitled in Maine.** — Any householder in actual possession, who is not the owner of an exempted lot purchased from the State, may claim the benefit of the act; and the right once acquired continues during the widowhood of the homesteader's widow or the minority of any of his children.[10]

§ 567. **In Maryland** the right of homestead appears to be unknown.

§ 568. **Who entitled in Massachusetts.** — In this State, a homesteader must be a householder having a family occupying the premises owned or possessed by him as a residence. On his death, the exemption is continued for the benefit of

[1] Statutes (1894), § 1708.
[2] Stults *v.* Sale, 92 Ky. 5; s. c. 17 S. W. Rep. 148.
[3] Merrifield *v.* Merrifield, 82 Ky. 526.
[4] Sansberry *v.* Simms, 79 Ky. 527.
[5] Loyd *v.* Loyd, 82 Ky. 521; Ellis *v.* Davis, 90 Ky. 183; s. c. 14 S. W. Rep. 74.
[6] Const. of 1879, §§ 219, 220. Head of a family, see *ante*, § 547.
[7] Woods *v.* Perkins, 43 La. Ann. 317; s. c. 9 So. Rep. 48.
[8] Herbert *v.* Mayer, 42 La. Ann. 839; s. c. 8 So. Rep. 590.
[9] Martin *v.* Walker, 43 La. Ann. 1019; s. c. 10 So. Rep. 365.
[10] Rev. Stat. (1883) c. 81, §§ 63, 66.

his widow during widowhood, or for the children until the majority of the youngest.[1] It is not lost by death or absence of wife and children.[2] An unmarried woman without children cannot claim it.[3] After the majority of the children, it cannot be claimed by the widow if she has ceased to occupy the premises.[4]

§ 569. **Who entitled in Michigan.** — Any resident of the State may select not to exceed forty acres without, or not to exceed one lot within, any recorded town plat, or city or village, and exempt it from forced sale, as a homestead, provided it be owned and occupied by him. The exemption continues during the occupation of the widow or minor child or children of the homesteader.[5] This statute does not exempt the fee, except in the event of a conveyance of the land during occupation.[6] Mere intention to occupy the premises as a homestead is of no avail.[7] The law of this State is peculiar in that the homestead is restricted not only as to area but as to value. If it exceeds $1,500 in value and cannot be divided, the owner may retain it on paying the surplus value to the creditor; failing which, the creditor may sell the land. Of the proceeds of such sale, $1,500 must be paid to the debtor (exempt for one year), the creditor being entitled to satisfaction out of the surplus.[8] Any person owning and occupying any house on land not his own, and claiming such house as a homestead, is entitled to this exemption.[9]

§ 570. **Who entitled in Minnesota.** — The exemption extends to any resident of this State owning and occupying the land claimed as a homestead. The exemption benefit survives to the widow and minor child or children of a homesteader. The exemption does not cease if the homesteader abscond from the State, or desert his wife or minor children, as long as she or they continue to occupy the homestead. Any person owning and occupying a house on land not his own, and claim-

[1] Pub. Stat. c. 123, § 8.
[2] Silloway *v.* Brown, 12 Allen, 30; Doyle *v.* Coburn, 6 Allen, 71.
[3] Woodworth *v.* Comstock, 10 Allen, 425.
[4] Paul *v.* Paul, 136 Mass. 286.
[5] Howell's Ann. Stat. (1882) § 7721.
[6] Drake *v.* Kinsell, 38 Mich. 232; Smith *v.* Rumsey, 33 Mich. 183.
[7] See *ante*, § 545.
[8] Howell's Ann. Stat. §§ 7723, 7729.
[9] Ibid. § 7726.

ing such house as a homestead, is entitled to the exemption.[1] By an amendatory act, the foregoing right to exempt the homestead merely while it continued to be occupied as such was enlarged to an exemption of the fee in the event of a conveyance by the owner or of his removal therefrom.[2] But the right of an existing judgment creditor to sell the exempt premises in the event of their ceasing to be a homestead was a vested right which was not affected by this act.[3] The time during which the exemption will continue after removal is now limited.[4] While the exemption can only be claimed by an owner, it is sufficient that he be the equitable owner.[5]

§ 571. **Who entitled in Mississippi.** — The exemption extends to every citizen of the State, male or female, being a householder, and having a family. The premises claimed as exempt must be owned and occupied as a residence by the beneficiary;[6] but the term "owned" seems to be satisfied by any assignable estate in the land.[7] Actual residence and occupation are necessary;[8] but residence as tenant at will on one tract will exempt an adjoining tract "owned," provided the two do not exceed the statutory area.[9] A householder who shelters, but does not support, an informally adopted daughter and her husband is not within the act as having a family.[10] The fee is protected in the event of sale,[11] or of the homesteader dying testate or intestate leaving a widow or children, or both;[12] but if he die leaving neither widow nor children, his homestead becomes assets to be administered.[13]

§ 572. **Who entitled in Missouri.** — The exemption extends to every housekeeper or head of a family actually using the land

[1] Stat. (1891) §§ 3941, 3942.
[2] Ibid. § 3948.
[3] Tillotson *v.* Millard, 7 Minn. 513.
[4] Stat. (1891) § 3949.
[5] Wilder *v.* Haughey, 21 Minn. 101.
[6] Ann. Code (1892), § 1970; Hand *v.* Winn, 52 Miss. 784.
[7] Berry *v.* Dobson, 68 Miss. 483; s. c. 10 So. Rep. 45.
[8] Campbell *v.* Adair, 45 Miss. 170; Hand *v.* Winn, *supra*.
[9] King *v.* Sturges, 56 Miss. 606.
[10] Hill *v.* Franklin, 54 Miss. 632
[11] Ann. Code, § 1982.
[12] Ibid. § 1551; Norris *v.* Callahan, 59 Miss. 140.
[13] Ann. Code, § 1552.

as a homestead. The protection continues during the life of the surviving widow or the minority of the children.[1] The fee is protected in the event of conveyance.[2]

§ 573. **Who entitled in Montana and Nebraska.** — A homestead[3] may be selected and claimed by a husband, or by any person who has residing on the premises with him or her or under his or her care or maintenance, either his or her minor child or the minor child of a deceased wife or husband, or a minor brother or sister, or the minor child of a deceased brother or sister; or a father, mother, grandfather, or grandmother; or the father, mother, grandfather, or grandmother of a deceased husband or wife; or an unmarried sister; or any other of the above-mentioned relatives who have attained majority and are unable to take care of or support themselves.[4] Upon the death of the homesteader the property goes, subject to a life use in the surviving husband or wife, to the heirs or devisees, free from liability for all debts of the decedent except certain ones specified in the act.[5]

§ 574. **Who entitled in Nevada.** — The exemption may be claimed by a husband or wife or other head of a family.[6] The homestead[7] character will not attach until a formal declaration of intention has been made in the way indicated by the statute.[8] Abandonment can only be effected by a declaration recorded in the same manner and in the same office as the declaration of claim.[9] The value of the homestead is limited to five thousand dollars, and the rights of creditors attach to the excess under a provision similar to that of Michigan (*q. v.*).[10] In certain cases, the estate in the homestead property becomes

[1] Rev. Stat. (1889) §§ 5435, 5439. Head of a family, see *ante*, § 547.

[2] Kendall *v.* Powers, 96 Mo. 142; s. c. 8 S. W. Rep. 793.

[3] Defined as "the dwelling-house in which the claimant resides, and the land on which the same is situated." Stat. Mont. (1895) p. 614, § 1670; Stat. Neb. (1893) p. 645, § 3256.

[4] Stat. Mont. p. 616, § 1694; Stat. Neb. p. 646, § 3270.

[5] Stat. Mont. p. 617, § 1703; Stat. Neb. p. 647, § 3272. Compare also the laws of California (*ante*, § 552) and Washington (*post*, § 592).

[6] Gen. Stat. (1885) § 539.

[7] See *ante*, § 545.

[8] Lachman *v.* Walker, 15 Nev. 422; Child *v.* Singleton, 15 Nev. 461.

[9] Gen. Stat. § 540.

[10] Ibid. § 541.

one in joint tenancy in husband and wife, whereby the fee is protected. Where, however, the homestead remains the separate property of either spouse, the fee is protected only in favor of children inheriting. Unmarried persons can claim a homestead only when and as long as they have the care and maintenance of minor sisters or brothers, or of a brother's or sister's minor children, or of a father or mother, or grandparents, or unmarried sisters living in the house with them. Upon the death of an unmarried person, as well as of a childless married person, the homestead exemption ceases, and the land becomes assets for the payment of debts.[1]

§ 575. **Who entitled in New Hampshire.** — Every person is entitled to five hundred dollars' worth of his homestead[2] or of his interest therein, as a homestead right. The exemption enures to the benefit of a surviving husband or wife for life and to the minor children during minority.[3] The exemption is a personal privilege,[4] incidental to the owner's "life estate," and the reversion may be taken on execution.[5]

§ 576. **Who entitled in New Jersey.** — Every householder having a family may hold the lot and buildings thereon, owned and occupied by him as a residence, to the value of one thousand dollars. The exemption continues after the death of such householder for the benefit of the widow and family, during occupancy by one or more of them, until the youngest child becomes of age and until the death of the widow.[6]

§ 577. **Who entitled in New Mexico.** — Husband and wife, widow or widower, living with an unmarried daughter or minor son, may hold exempt a family homestead not exceeding one thousand dollars in value, and the husband, or, in case of his failure or refusal, the wife, shall have the right to make the demand therefor; but neither can make such demand if the other has a homestead.[7] If a homesteader die leaving a widow and a

[1] Gen. Stat. § 542.

[2] Actual residence on the land is not necessary, if it be actually and conveniently used in connection with the residence Libbey *v.* Davis, 68 N. H. 355; s. c. 34 Atl. Rep. 744.

[3] Pub. Stat. (1891) p. 379.

[4] Currier *v.* Sutherland, 54 N. H. 475.

[5] Cross *v.* Weare, 62 N. H. 125.

[6] Gen. Stat. (1895) p. 2997.

[7] Comp. Laws (1897), § 1747.

minor child unmarried, the right of exemption continues as long as any unmarried minor child resides on the premises, although the widow die; the right being to exempt from sale on execution, attachment, or under *order of court.* Here follows a singular provision: "And the unmarried minor child or children of a decedent, actually residing on the family homestead, shall be entitled to hold the same exempt from sale on execution or attachment, although the parent from whom the same descended left no wife or husband living."[1] The homestead being limited in value, and there being a general provision[2] in the act for the sale under order of court of an indivisible homestead exceeding such value, it would seem that it is intended under the conditions named to preserve, intact, an indivisible homestead, irrespective of value.

§ 578. **Who entitled in New York.** — The exemption right may be claimed by any householder having a family, and owning and occupying as a residence the property claimed as exempt; or by a married woman who owns and occupies the premises as a residence; and upon the death of a homesteader the exemption continues, if the decedent was a woman, for the benefit of her surviving children, until the majority of the youngest surviving child; and if the decedent was a man, for the benefit of his widow and surviving children until the majority of the youngest surviving child and the death of the widow. Temporary suspension of occupation of the exempt property as a residence for not more than a year in consequence of the destruction of, or injury to, the dwelling, will not affect the right.[3] In this State, the homestead right is a mere personal privilege, not discharging the lien of a judgment, but suspending it, a right not running with the land and not transferable to another with it.[4] The statute is to be liberally construed.[5]

§ 579. **Who entitled in North Carolina.** — Every resident of this State may exempt a homestead of a limited value.[6] The

[1] Comp. Laws (1897), § 1749.

[2] Ibid. § 1751. These provisions do not, as yet, appear to have received judicial construction.

[3] Bliss's Ann. Code, §§ 1397–1401.

[4] Allen *v.* Cook, 26 Barb. 374; Smith *v.* Brackett, 36 Barb. 571.

[5] Steward *v.* Brown, 37 N. Y. 350; and see *ante*, § 544.

[6] Const. art. 10, § 2.

right is a mere stay of execution,[1] but it stays the execution in favor of a vendee as long as the vendor has the qualifications for acquiring a homestead, *i. e.*, during the life and the residence in the State of the vendor.[2] A fugitive from justice, temporarily absent, *animo revertendi*, does not lose the right.[3] But the residence must be actual and not constructive; therefore one who has removed from the State with the expectation of returning at some uncertain time is not entitled to the exemption.[4] The residence must be preserved by the debtor personally, and cannot be retained vicariously for him by his wife and children.[5] After the death of a homesteader, the exemption continues during the minority of any of his children, and if there be no children, during the life of the widow.[6] A remainder-man cannot claim the exemption.[7]

§ 580. **Who entitled in North Dakota.** — A homestead[8] may be claimed by every head of a family residing in this State. "Head of a family" is defined as husband or wife when the claimant is married (but in no case are both husband and wife each entitled to a homestead); every person who has residing on the premises with him or her and under his or her care and maintenance either his or her child, or the child of his or her deceased wife or husband, whether by birth or adoption; a minor brother or sister, or the minor child of a deceased brother or sister; a father, mother, grandfather, or grandmother; the father, mother, or grandparent of a deceased husband or wife; an unmarried sister; or any of the relatives before mentioned who have attained majority and are unable to take care of or support themselves. The exemption protects the fee.[9]

§ 581. **Who entitled in Ohio.** — Husband and wife living

[1] Fleming *v.* Graham, 110 N. C. 374; s. c. 14 S. E. Rep. 922.

[2] Gardner *v.* Batts, 114 N. C. 496; s. c. 19 S. E. Rep. 794.

[3] Chitty *v.* Chitty, 118 N. C. 647; s. c. 24 S. E. Rep. 517.

[4] Munds *v.* Cassidey, 98 N. C. 558; s. c. 4 S. E. Rep. 353.

[5] Finley *v.* Saunders, 98 N. C. 462; s. c. 4 S. E. Rep. 516.

[6] Const. art. 10, §§ 3, 5; Stern *v.* Lee, 115 N. C. 426; s. c. 20 S. E. Rep. 736.

[7] Murchison *v.* Phyler, 87 N. C. 79.

[8] Homestead defined, *ante*, § 545.

[9] Rev. Codes (1895), §§ 3605, 3625, 3630. Removal from the State, working an abandonment, see Kuhnert *v.* Conrad, 6 N. D. 215; s. c. 69 N. W. Rep. 185.

together, a widow or a widower living with an unmarried daughter or unmarried minor son, is entitled to exempt a family homestead of limited value. Upon the death of one entitled to the exemption who leaves a widow or a minor child unmarried, it continues as long as the widow, if she remain unmarried, or any unmarried minor child of the decedent resides thereon.[1]

§ 582. **Who entitled in Oklahoma.** — In this Territory, the homestead provisions are more vague than any we have heretofore considered. The homestead of "a family" is exempt. The following persons are excluded from the benefit of the act: corporations for profit, non-residents, debtors in the act of removing their families from the Territory, and debtors who have absconded, taking with them their families. The homestead may be mortgaged.[2]

§ 583. **Who entitled in Oregon.** — The homestead of any family is exempt. It must be the actual abode of the family and must be owned by the family or some members thereof. Upon the death of the owner, the homestead descends to the heirs free from liability for decedent's debts.[3]

§ 584. **In Pennsylvania and Rhode Island** there is no homestead exemption.

§ 585. **Who entitled in South Carolina.** — The exemption is given to the head of any family residing in this State, and to the wife of any such head of a family, who has not of his own sufficient property to constitute a homestead.[4]

§ 586. **Who entitled in South Dakota.** — The homestead of every family resident in this State, whether owned by husband or wife, is exempt. The fee is protected in the event of a conveyance. Upon the death of a homesteader, the estates of surviving husband or wife and of issue are protected; but

[1] Rev. Stat. (1896) §§ 5435, 5437.

[2] Stat. (1893) § 2845. The exemption being created only in favor of the "homestead of a family," it is difficult to see how, by the application of the most liberal rules of construction, a corporation not for profit could have the benefit of the act. See *ante*, § 545.

[3] Act of Feb. 21, 1893.

[4] Const. (1895) art. 3, § 28. A son who cares for his widowed mother is the head of a family. Scott *v.* Mosely, 54 S. C. 375 ; s. c. 32 S. E. Rep. 450. But the foregoing case fails to show whether the mother was living with the son or not. And see *ante*, § 547. Homestead defined, *ante*, § 545.

as against collateral heirs the homestead of a decedent is liable for debts.[1]

§ 587. **Who entitled in Tennessee.** — The exemption is given to each head of a family in possession of or owning a homestead. Upon the homesteader's death the exemption continues during the life of his widow and the minority of any of his children.[2] The statute is to be liberally construed in favor of the claimant.[3] The statute gives no protection to the fee — only to the occupancy of the land during the life of the tenant and his widow and the minority of the children[4] — except in the case of a conveyance by the joint deed of husband and wife.

§ 588. **Who entitled in Texas.** — "The homestead of the family" is exempt. The fee is protected.[5] Whether land is exempt from liability for the debts of its owner necessarily depends upon the meaning of "homestead" and "family." In this State not only has the general meaning[6] of the word "homestead" been exhaustively considered, but it is given a special statutory meaning, in that it *may* consist of a place in a city, town, or village, "to exercise the calling or business of the head of the family."[7] It seems that there can be no "home" in this State within the definition of homestead, in the absence of domicil.[8]

[1] Ann. Stat. (1899) §§ 3359, 3361, 3366, 3376, 3377. "Family" is defined as a widow or widower, though without children, while continuing to occupy the house used as such at the time of the death of the husband or wife. § 3360. And "every family, whether consisting of one or more persons, in the actual occupancy of a homestead as defined in this chapter," is a family. § 3379. As yet, no judicial construction of this section seems to have been reported.

[2] Shannon's Ann. Code, §§ 3798, 3807. Homestead defined, *ante*, § 545.

[3] Dickinson *v.* Mayer, 11 Heisk. 515; Arnold *v.* Jones, 9 Lea, 545, 548; Ren *v.* Driskell, 11 Lea, 642; White *v.* Fulghum, 87 Tenn. 281; s. c. 10 S. W. Rep. 501; Jackson *v.* Shelton, 89 Tenn. 82; s. c. 16 S. W. Rep. 142; Loftis *v.* Loftis, 94 Tenn. 232; s. c. 28 S. W. Rep. 1091; and see *ante*, § 544.

[4] Fauver *v.* Fleenor, 13 Lea, 622.

[5] Batts' Ann. Civ. Stat. (1895) §§ 2395, 2396.

[6] H. & G. N. R. Co. *v.* Winter, 44 Tex. 597; Iken *v.* Olenick, 42 Tex. 195; Wilson *v.* Cochran, 31 Tex. 677; Holliman *v.* Smith, 39 Tex. 357; Phillen *v.* Smalley, 23 Tex. 498; Newman *v.* Farquhar, 60 Tex. 640. House is embraced in the word "homestead." Franklin *v.* Coffee, 18 Tex. 413. See *ante*, § 545.

[7] § 2396, *supra*.

[8] Alston *v.* Ulman, 39 Tex. 157.

§ 589. **Who entitled in Utah.** — A homestead[1] exemption is given to the "head of the family;"[2] but non-residents and persons about to depart from this State with the intention of removing their effects therefrom are expressly excepted from the benefit of the act.[3] The statutory definition of "head of a family" is identical with that of North Dakota (*q. v.*, § 580).[4] The fee is protected.[5] In case the husband or wife desert his or her family, the exemption continues for the benefit of the one residing on the premises.[6]

§ 590. **Who entitled in Vermont.** — The premises used or kept by a housekeeper or head of a family as a homestead are exempt.[7] Actual occupation as a home is essential; therefore where a man lived on his wife's land, it was held that he could not claim homestead rights in land belonging to himself, lying contiguous to his wife's, and used in connection with his wife's house as a home for the family.[8] The fee is protected in the event of a statutory conveyance, or upon the death of the homesteader leaving a widow or minor children.[9]

§ 591. **Who entitled in Virginia.** — Every householder or head of a family may secure an exemption, which, however, does not appear to be of a homestead, but of any "real estate" to the value of two thousand dollars.[10] The fee is protected in the event of a statutory conveyance; but upon the owner's death the exemption is only continued during the life of the widow and while she remains unmarried, and during the minority of the unmarried children.[11] "Householder" is held to be synonymous with "head of a family."[12] By construc-

[1] See *ante*, § 545. The meaning of "homestead" is broadened in this act in that the "lands may be in one or more localities."

[2] Rev. Stat. (1898) § 1147.

[3] Ibid. § 3247.

[4] Ibid. § 1154.

[5] Ibid. §§ 1158, 2829.

[6] Ibid. § 1157.

[7] Stat. (1894) § 2179. "Head of a family" defined, *ante*, § 547. "Homestead" defined, *ante*, § 545.

[8] Rice *v.* Rudd, 57 Vt. 6.

[9] Stat. §§ 2183, 2184. See White *v.* White, 63 Vt. 577; s. c. 22 Atl. Rep. 602; Goodall *v.* Boardman, 53 Vt. 92.

[10] Code (1887), § 3630.

[11] Ibid. § 3635.

[12] See *ante*, § 547.

tion, the term "householder" is restricted to citizens of this State, and the right once acquired will be lost by change of domicil.[1]

§ 592. **Who entitled in Washington.** — The law is identical with that of California, except that no difference is made between married and unmarried persons[2] as to the values of their respective homesteads.

§ 593. **Who entitled in West Virginia.** — The benefit of the homestead act is given to any husband or parent residing in this State; and if any person who has taken the benefit of the act by having his homestead recorded, die, the exemption will continue for the benefit of his or her minor children until all of the children attain their majority.[3]

§ 594. **Who entitled in Wisconsin.** — A homestead consisting of the land (the quantity being dependent on the urban or rural character of the property) and the dwelling-house thereon and its appurtenances, owned and occupied by any resident of this State, is exempt. The fee is protected in favor of purchasers,[4] heirs,[5] and devisees.[6]

§ 595. **Who entitled in Wyoming.** — Every householder, being the head of a family, is entitled to a homestead the exemption of which continues as long as the premises are occupied by the owner thereof, or the person entitled thereto, or his or her family. Upon the decease of a homesteader, the exemption continues in favor of surviving husband, wife, or minor children.[7] By implication, the fee is protected in favor of a purchaser under a statutory conveyance, but not otherwise.[8]

§ 596. **Homestead never wholly exempt — Exemptions in the Several States.** — As we have already seen, the Federal Constitution prevents a homestead from being exempted from contract liabilities existing at the time of the passage of the

[1] Lindsay *v.* Murphy, 76 Va. 428.

[2] Ballinger's Codes & Statutes (1897), §§ 5214–5246. See *ante*, § 552. Compare also the laws of Montana and Nebraska, *ante*, § 573.

[3] Code (1891), pp. 303, 304.

[4] Sanborn Berryman's Ann. Stat. (1889) § 2983.

[5] Ibid. § 2271.

[6] Johnson *v.* Harrison, 41 Wis. 381.

[7] Rev. Stat. (1899) §§ 3901–3903. "Homestead" defined, *ante*, § 545. "Head of a family" defined, *ante*, § 547.

[8] Rev. Stat. § 3906.

exemption act. But leaving aside this protection to creditors, in no State is the exemption absolute. In some States, the exemption privilege is exceedingly limited, being confined to protection from specified liabilities, *e. g.*, debts, giving rise to some very interesting questions as to what constitutes a debt within the meaning of the act; in others, there is a sweeping grant of immunity from forced sale under any kind of process with certain exceptions in favor of particular obligations, *e. g.*, taxes, purchase-money, and the like. The homestead is exempt from forced sale in satisfaction of the following obligations: —

Alabama. — Debts contracted after April 23, 1873.[1]

Arizona. — All obligations except prior liens and incumbrances.[2]

Arkansas. — The property is exempt from the lien of any judgment or decree of any court, and from sale under execution, or other process thereon, except such as may be rendered for the purchase-money, or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys, or for moneys collected by them, and other trustees of an express trust, for moneys due by them in their fiduciary capacity.[3]

California and Montana. — Exemption from execution or forced sale except in satisfaction of judgments obtained before the declaration of homestead was filed for record, and which constitute liens on the premises; or on debts secured by mechanics', laborers', or vendors' liens on the premises;

[1] Civ. Code (1896), 2033. As to what obligations come within the term "debts," see *post*, § 597.

[2] Rev. Stat. (1887) §§ 2071, 2084.

[3] Sandels & Hill's Dig. (1894) § 3710. Homestead subject to vendor's lien. Tunstall *v.* Jones, 25 Ark. 272. An attorney who receives money to indemnify himself against liability as surety for his client and converts it to his own use, is not within the exceptions, and his homestead is not liable. Sanders *v.* Sanders, 56 Ark. 585; s. c. 20 S. W. Rep. 517. Sureties on a guardian's bond are subrogated to the ward's right against their principal's homestead. State *ex rel. v.* Atkins, 53 Ark. 303; s. c. 13 S. W. Rep. 1096; Gilbert *v.* Neely, 35 Ark. 24. Mechanics' liens: see Anderson *v.* Seamans, 49 Ark. 475; s. c. 5 S. W. Rep. 799. Not liable for costs of criminal prosecution: Hollis *v.* State, 59 Ark. 211; s. c. 27 S. W. Rep. 73. Liable to assignee of purchase-money note. Boone Co. Bank *v.* Hensley, 62 Ark. 398; s. c. 35 S. W. Rep. 1104.

or on debts secured by mortgages on the premises, executed and acknowledged by a husband and wife or by an unmarried claimant; or on debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record.[1]

Colorado. — Any debt, contract, or civil obligation incurred after February 1, 1868.[2]

Connecticut. — Exemption from attachment, execution, or judgment lien for any debt or liability incurred after the recording of a homestead declaration.[3]

Delaware. — No homestead exemption.

District of Columbia. — No homestead exemption.

Florida. — Exemption from forced sale under process of any court; but no property is exempt as against taxes or assessments or purchase obligations, or the erection or repair of improvements on the property, or house, field, or other labor performed on the same.[4]

Georgia. — All obligations except taxes, purchase-money, labor done on the premises, or material furnished therefor, or obligations incurred in the removal of incumbrances thereon.[5]

Idaho. — Exemption from execution or forced sale except in satisfaction of judgments obtained before the declaration of homestead was filed for record, and which constitute liens on the premises; or in an action in which an attachment was levied upon the premises before the filing of such declaration; on debts secured by mechanics', laborers', or vendors' liens upon the premises; on debts secured by mortgages on the premises, executed and acknowledged by the husband and wife or by an unmarried claimant; on debts secured by mortgages

[1] Deering's Civ. Code, § 1241; Montana Codes & Stat. (1895) § 1674.

[2] Mills' Ann. Stat. (1891) § 2132.

[3] Gen. Stat. (1888) § 2783.

[4] Const. art. 10, § 1. All indebtedness for money borrowed and expended in improving the homestead is not within the exception; and if such a claim be united with another which might, alone, have been enforced against the homestead, and a general money judgment recovered for the aggregate amount, the homestead is exempt from the whole. Lewton *v.* Hower, 18 Fla. 872. A covenant made in consideration of a conveyance of land which becomes the homestead of the covenantor, is a purchase obligation. Porter *v.* Teate, 17 Fla. 813.

[5] Code (1895), § 2827. An attorney's services in defending the homestead against creditors are in the nature of labor done or purchase-money paid on the homestead, for which it is liable. Stroheeker *v.* Irvine, 76 Ga. 639.

on the premises executed and recorded before the declaration of homestead was filed for record.[1]

Illinois. — All obligations except taxes, or liability incurred in the purchase or improvement of the property.[2]

Indian Territory. — The same as in Arkansas (*q. v.*).

Indiana. — No homestead exemption.[3]

Iowa. — Exemption from judicial sale except for unpaid purchase-money; mechanic's lien for work, labor, or material done or furnished exclusively for the improvement of the premises; debts contracted prior to its acquisition (but all other property of the debtor must first be exhausted), and debts created by written contracts, executed by the persons having the power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt.[4]

Kansas. — Exemption from forced sale under any process of law, except for taxes, obligations contracted for the purchase of the homestead or for the erection of improvements thereon, and to enforce liens given by the consent of both husband and wife.[5]

Kentucky. — All obligations incurred after June 1, 1866, except mortgages, purchase-money obligations, and debts or liabilities existing prior to the purchase of the land, or to the erection of the improvements thereon.[6] The right of exemption dates from the payment of the purchase-money, and to the extent of any part of the purchase-money paid after the creation of a debt or liability, the latter may be enforced against the homestead.[7]

[1] Rev. Stat. (1887) § 3039.

[2] Rev. Stat. c. 52, § 3. Money borrowed to pay a pre-existing purchase debt is not a liability incurred in the purchase of the property; otherwise of money borrowed at the time of the purchase, to pay for the land. Austin *v.* Underwood, 37 Ill. 438. If a mortgage on one tract be given for the purchase-money of another, which is occupied as a homestead, a deficiency decree upon foreclosure is enforceable out of the homestead. Bush *v.* Scott, 76 Ill. 524.

[3] See Rev. Stat. (1894) § 715.

[4] Code (1897), §§ 2972, 2975, 2976; Campbell *v.* Maginnis, 70 Iowa, 589; s. c. 31 N. W. Rep. 946. No distinction between foreign and domestic debts incurred prior to the acquisition of the homestead. Brainard *v.* Van Kuran, 22 Iowa, 261.

[5] Const. art. 15, § 9.

[6] Stat. (1894) § 1702.

[7] Moseley *v.* Bevins, 91 Ky. 260; s. c. 15 S. W. Rep. 527.

Louisiana. — All obligations except for the purchase price of the property or any part thereof; for labor and material furnished for building, repairing, or improving the homestead; for liabilities incurred by any public officer or fiduciary or any attorney-at-law for money collected or received on deposit; and for taxes or assessments.[1]

Maine. — Debts contracted subsequent to the filing and recording of a certificate of homestead.[2]

Maryland. — There is no homestead exemption.

Massachusetts. — Exemption from sale for the payment of debts or legacies, except taxes, debts contracted for the purchase of the homestead, debts contracted prior to the designation of the homestead in the statutory manner, or before the homestead was acquired, and prior mortgages, liens, and incumbrances.[3]

Michigan. — All debts growing out of or founded upon contract, express or implied, made after July 3, 1848.[4]

Minnesota. — Exemption from sale upon execution or any other process issuing out of any court, except upon mortgage foreclosure, or for the enforcement of any contract for a lien, or upon which a lien would arise under the lien laws of this State, or for work done or materials furnished in the erection or repair of a dwelling house or other buildings on the land. The homestead is also liable for taxes.[5]

Mississippi. — All obligations except taxes, assessments, labor done upon the premises or materials furnished therefor, judgments for labor performed, or upon a forfeited recognizance or bail-bond, and judgments rendered in whole or in part for the purchase-money of the homestead.[6]

Missouri. — All obligations except those causes of action existing prior to the acquiring of the homestead.[7] But a homestead bought after an indebtedness accrued, with the

[1] Const. (1879) art. 220. An agent intrusted with the funds of his principal acts in a fiduciary capacity and can claim no exemption as against a judgment for misappropriation. Bridewell *v.* Halliday, 37 La. Ann. 410.

[2] Rev. Stat. (1883) c. 81, § 64.

[3] Pub. Stat. (1882) c. 123, §§ 4, 5.

[4] Howell's Ann. Stat. (1882) § 7721.

[5] Stat. (1891) §§ 3941, 3943, 3944.

[6] Ann. Code (1892), § 1980; Patrick *v.* Rembert, 55 Miss. 87.

[7] Rev. Stat. (1899) § 3622.

proceeds of a former homestead, is exempt.[1] The fact that the State is the creditor does not make the homestead liable.[2]

Montana. — See California, *supra.*

Nebraska. — Exemption from judgment liens, execution or forced sale except in satisfaction of judgments obtained on debts secured by mechanics', laborers', or vendors' liens upon the premises; or on debts secured by mortgages upon the premises, executed and acknowledged by both husband and wife or an unmarried claimant.[3]

Nevada. — Exemption from forced sale on any final process from any court for any debt or liability incurred after Nov. 13, 1861, except process to enforce the payment of purchase-money for the premises, or for improvements made thereon, or for taxes thereon, or for the payment of any mortgage thereon, executed and given by both husband and wife, when that relation exists.[4]

New Hampshire. — All debts except taxes; debts created in the construction, repair, or improvement of the homestead and secured by lien; mortgages charged on the premises according to law. But a homestead exceeding the statutory value of five hundred dollars may be sold under any execution unless the homesteader pay the excess of such value; the proceeds of sale being always secured to the debtor to the amount of five hundred dollars.[5]

New Jersey. — All debts, provided statutory designation of the homestead be made, except taxes and assessments; debts due for labor done thereon or materials furnished therefor; and debts contracted for the purchase thereof or prior to the recording of the aforesaid designation of the homestead. The value of the homestead is limited to one thousand dollars, and if it exceeds this value is liable to be sold, the rights of the homesteader being preserved in a manner similar to that in New Hampshire, as described above.[6]

New Mexico. — Exemption from sale or judgment or order, except for taxes or to enforce mortgages executed by the debtor's wife. The value of the homestead is limited to one

[1] Farra *v.* Quigly, 57 Mo. 284.
[2] State *v.* Pitts, 51 Mo. 133.
[3] Comp. Stat. (1899) p. 645, § 3.
[4] Gen. Stat. (1885) § 539.
[5] Pub. Stat. (1891) c. 138.
[6] Gen. Stat. (1895) p. 2997.

thousand dollars in value, exceeding which it is liable to sale under conditions similar to those in New Hampshire, described above.[1]

New York. — All debts contracted after April 30, 1850, unless the judgment was recovered wholly for a debt or debts contracted before the designation of the property as a homestead or for the purchase-money thereof. The homestead is liable for taxes and assessments.[2]

North Carolina. — All debts, except taxes, obligations incurred in the purchase of the premises, and laborers' and mechanics' liens for work and labor.[3]

North Dakota. — All obligations, except judgments obtained on debts secured by mechanics' or laborers' liens for work or labor done, or materials furnished exclusively for the improvement of the homestead; or on debts secured by mortgage on the premises executed and acknowledged by both husband and wife or an unmarried claimant; or on debts created for the purchase of the homestead; and for all taxes accruing and levied thereon.[4]

Ohio. — Exemption from sale on judgment or order, except on a judgment rendered on a mortgage executed by a debtor and his wife; and on a claim for manual work or labor, less than one hundred dollars; and on purchase-money liens, whether by mortgage or otherwise; and on the lien of a mechanic or other person, under any statute of this State, for materials furnished or labor performed in the erection of the dwelling-house on the premises; and for taxes due thereon;[5] and for all fines, costs, and damages assessed against any person in consequence of the sale of intoxicating liquors (causing intoxication);[6] and for fines, costs, and recoveries under the gaming laws.[7]

[1] Comp. Laws (1897), §§ 1747–1756.

[2] Bliss' Ann. Code (1895), § 1397. Breach of promise of marriage does not give rise to a debt within the meaning of the homestead act. The action is substantially one of tort. Cook *v.* Newman, 8 How. Pr. 523. No exemption from sale under judgments rendered in actions sounding in tort, or on executions for defendants' costs in such actions. Lathrop *v.* Singer, 39 Barb. 396.

[3] Const. art. 10.

[4] Rev. Codes (1895), §§ 3605, 3607.

[5] Rev. Stat. (1891) §§ 5434, 5435.

[6] Ibid. § 4363.

[7] Ibid. § 4275.

Oklahoma. — All debts, except purchase-money, taxes, and debts due for work and material used in constructing improvements thereon, and debts secured by mortgage; but such work and material or mortgage indebtedness must have been contracted for in writing, and the consent of the wife, if there be one, must have been given in the same manner as is by law required in making a sale and conveyance of the homestead.[1]

Oregon. — The homestead is exempt from judicial sale for the satisfaction of any liability incurred after February 21, 1893; except foreclosure sale upon a mortgage which, if the owners of the property were married at the time of execution, must have been executed by husband and wife.[2]

Pennsylvania. — No homestead exemption.

Rhode Island. — No homestead exemption.

South Carolina. — Exemption from sale on any process from any court, except that the homestead is liable for taxes, for the payment of obligations contracted for the purchase of the homestead or the erection or making of improvements or repairs thereon, and for a debt secured by mortgage executed by both husband and wife, if both be living. The value of the homestead is limited, and if it be of greater value, it may be sold under conditions similar to those described above as obtaining in New Hampshire.[3]

South Dakota. — Exemption from judicial sale, judgment lien, and any process from any court, except that the homestead may be sold for taxes accruing thereon; and in satisfaction of mortgages concurred in and jointly signed by both husband and wife, if the owner is married and both husband and wife are residents of this State.[4]

Tennessee. — All obligations, except those incurred in the purchase of the homestead, or for improvements made thereon, taxes, judgments for failure or refusal to work on the public

[1] Stat. (1893) §§ 2844, 2847.

[2] Act of Feb. 21, 1893.

[3] Const. (1895) § 28.

[4] Ann. Stat. (1899) §§ 3359–3365. Other exceptions are given, viz., mechanics' liens and purchase-money obligations, but it is held that these provisions were repealed by c. 86, Acts of 1890. Fallihee *v.* Wittmayer, 9 S. D. 479; s. c. 8 N. W. Rep. 642; Morgan *v.* Benthein, 10 S. D. 650; s. c. 75 N. W. Rep. 204.

roads, fines and costs for voting out of the civil district or ward in which the voter lives, or for carrying deadly or concealed weapons, or for giving away or selling intoxicating liquors on election days.[1] In the case of a leasehold estate the exemption cannot be claimed as against process for rent.[2] Nor can the exemption be claimed as against a debt secured by a mortgage which is a valid lien on the premises.[3]

Texas. — All debts, except for purchase-money, taxes due thereon, and for work and material used in constructing improvements thereon; but in this last case such work and material must have been contracted for in writing, and the consent of the wife, if there be one, must have been given in the same manner as is by law required in making a sale and conveyance of the homestead.[4] All mortgages of the homestead, deeds of trust, or pretended conveyances thereof involving any condition of defeasance are void,[5] except those securing debts for which the homestead could be held.

Utah. — All obligations except debts secured by mechanics' or laborers' liens for work or labor done or material furnished exclusively for the improvement of the homestead; debts secured by lawful mortgage on the premises; debts created for the purchase of the homestead; and taxes accruing and levied thereon.[6]

Vermont. — All obligations except taxes assessed thereon; causes of action existing at the time of acquiring the homestead (except that where one homestead is acquired with the proceeds of a previous homestead, or with other means not derived from the property of the homesteader, it shall not be liable for any causes of action to which such prior homestead would not have been liable); mortgages in the execution of which both husband and wife have joined.[7]

[1] Shannon's Ann. Code, §§ 3798, 3799.

[2] Ibid. § 3803.

[3] White *v.* Fulghum, 87 Tenn. 281 ; s. c. 10 S. W. Rep. 501.

[4] Batts' Ann. Stat. (1895) arts. 2396, 2401.

[5] Const. (1876) art. 16, § 50 ; Inge *v.* Cain, 65 Tex. 75 ; Hays *v.* Hays, 66 Tex. 606 ; s. c. 1 S. W. Rep. 895; Texas Land & Loan Co. *v.* Blalock, 76 Tex. 85 ; s. c. 13 S. W. Rep. 12. But the homestead may be sold and conveyed outright.

[6] Rev. Stat. (1898) §§ 1147, 1156.

[7] Stat. (1894) §§ 2179, 2186, 2187, 2188, 2191.

Virginia. — All debts or liabilities on contract except for the purchase price of the property or any part thereof; for services rendered by a laboring person or a mechanic; for liabilities incurred by any public officer, officer of court, fiduciary, or by an attorney-at-law for money collected by him; for a lawful claim for any taxes, levies, or assessments; for rent; for the legal or taxable fees of any public officer or officer of a court; for any debt or liability on contract, as to which the debtor or party to the contract has waived (as by law provided) the exemption to which he is entitled.[1]

Washington. — All obligations except debts secured by mechanics', laborers', or vendors' liens upon the premises; debts secured by mortgages on the premises, executed and acknowledged by husband and wife, or by an unmarried claimant.[2]

West Virginia. — All debts and liabilities incurred after the homestead is acquired and designated according to the statute, except debts incurred for the purchase-money thereof, or for the erection of permanent improvements thereon, and claims for taxes due thereon.[3]

Wisconsin. — All obligations except laborers', mechanics', and purchase-money liens, mortgages lawfully executed, and taxes lawfully assessed.[4]

Wyoming. — All debts, contracts, or civil obligations entered into or incurred.[5]

§ 597. "Debts." — In the States where the right of exemption is restricted to a protection against "debts," it becomes important to ascertain the construction which the courts have placed on this word. Broadly stated, the word, as used in these statutes, means any obligation arising out of contract, unless the breach of such contract gives rise to an action in the nature of tort. The exemption cannot be claimed as against judgments sounding in tort, or in the nature of tort, although sounding in contract. Thus, it could not be claimed against a judgment rendered against a public official on his

[1] Code (1887), § 3630.
[2] Ballinger's Codes (1897), §§ 5217, 5218.
[3] Code (1891), p. 303.
[4] Sanborn & Berryman's Ann. Stat. (1889) § 2983.
[5] Rev. Stat. (1899) § 3901.

bond,[1] or as against a fine for a violation of the criminal laws;[2] but it could be claimed by the sureties on an official bond, for theirs is a mere promise to pay money.[3] Judgment rendered for a breach of promise of marriage,[4] or in an action of trespass,[5] or for defendant's costs in an action of tort,[6] is not a debt within the meaning of the statute; but it has been held in Alabama that a judgment recovered in a suit for injury to goods in transportation by a common carrier is a debt within the meaning of the statute.[7] In Wisconsin, however, by construing the word "debts" in the homestead provision of the constitution in connection with the obvious meaning of the same word in another provision, the court decided that in that State it must be given a meaning broad enough to include all claims, whether founded upon tort or upon contract.[8]

§ 598. **Taxes and Assessments.** — It is well settled by a long line of authorities that the word "taxes," as used in constitutional provisions and tax acts, means general taxes for general municipal purposes, and does not include special taxes to meet a special burden, or assessments for benefits; although in many cases the language of the context has been as comprehensive as it could be made without enumerating the kinds and purposes of taxation.[9] These decisions, for the most part, refer to exemptions from taxation, which are to be strictly construed. As the homestead provisions are to be liberally construed in the homesteader's favor, an equally strict construction is to be placed on provisos taking certain cases out of the operation of the exemption clause. Hence,

[1] Schnessler *v.* Dudley, 80 Ala. 547; Vincent *v.* State, 74 Ala. 274.

[2] Whiteacre *v.* Rector, 29 Gratt. 714.

[3] State *v.* Allen, 71 Ala. 543.

[4] Cook *v.* Newman, 8 How. Pr. 523; Burton *v.* Mill, 78 Va. 468.

[5] Meredith *v.* Holmes, 68 Ala. 190.

[6] Lathrop *v.* Singer, 39 Barb. 396.

[7] McDaniel *v.* Johnston, 110 Ala. 526; s. c. 19 So. Rep. 35.

[8] Smith *v.* Omans, 17 Wis. 395.

[9] Worcester A. S. *v.* Mayor, etc. of Worcester, 116 Mass. 189; City of Paterson *v.* Society, etc., 24 N. J. L. 385; *In re* College St., 8 R. I. 474; Harris County *v.* Boyd, 70 Tex. 237; s. c. 7 S. W. Rep. 713; Sheehan *v.* Good Samaritan Hosp., 50 Mo. 155; *In re* Broad Street, 165 Penn. St. 475; s. c. 30 Atl. 1007; Illinois Cent. R. R. Co. *v.* Decatur, 147 U. S. 190; San Diego *v.* Linda Vesta Irr. Dist., 103 Cal. 189; s. c. 41 Pac. Rep. 291.

a proviso which specifically leaves the homestead liable for taxes, making no mention of assessments, will leave the homestead free from liability for assessments.[1]

§ 599. **Purchase and Improvement Obligations.** — These liabilities are generally excepted from the operation of the exemption, but in determining what liabilities fall within these classes, the courts have not been disposed to be technical. Thus, in Georgia it has been held that the services of an attorney rendered in defending a homestead from creditors were in the nature of purchase-money.[2] It is certain that as long as the original debt remains, the homestead cannot prevail against it, even though the debt be assigned or renewed or extended.[3] But money borrowed to pay off a pre-existing indebtedness incurred in buying or improving the homestead does not come within the exception.[4] Where, however, the purchase-money is advanced at the time of the purchase for the express purpose of securing a conveyance to the vendee, upon his promise to execute a mortgage, the person so furnishing the purchase-money will be subrogated to the vendor's lien for the purchase-money, until the lien is merged in mortgage. No general loan to the vendee will work this subrogation, although the money be traced into the land. The money must be paid to the vendor by the person making the advancement in such way as to make him a party to the transaction of purchase.[5] But this extension of the vendor's lien does not stand unchallenged.[6]

§ 600. **Destruction of Homestead Character — Waiver — Abandonment.** — Two conditions are universally demanded to impress land with the homestead character, — the existence of

[1] Higgins *v.* Bordages, 88 Tex. 458; s. c. 31 S. W. Rep. 52; Lovenberg *v.* Galveston, 17 Tex. Civ. App. 162; s. c. 42 S. W. Rep. 1024.

[2] Strohecker *v.* Irvine, 76 Ga. 639. Contrast Collier *v.* Simpson, 74 Ga. 697.

[3] Bentley *v.* Jordan, 3 Lea, 353; Smith *v.* High, 85 N. C. 93; Fox *v.* Brooks, 88 N. C. 234; Kimble *v.* Esworthy, 6 Bradwell (Ill.), 517; Williams *v.* Jones, 100 Ill. 362.

[4] Eyster *v.* Hatheway, 50 Ill. 521; Dreese *v.* Myers, 52 Kan. 126; s. c. 34 Pac. Rep. 349; Loftis *v.* Loftis, 94 Tenn. 232; 28 S. W. Rep. 1039.

[5] Carey *v.* Boyle, 53 Wis. 574; s. c. 11 N. W. Rep. 47; Magee *v.* Magee, 51 Ill. 500; Nichols *v.* Overacker, 16 Kan. 54, and cases cited in note to Magee *v.* Magee, *supra*, 99 Am. Dec. 571.

[6] See cases cited in note to Magee *v.* Magee, *supra*, 99 Am. Dec. 571.

certain family relations, and the use of the premises as a home. Between these two conditions the courts have very generally drawn an important distinction affecting the continuance of the homestead. As to the former, it will be found that once the premises have been impressed with the homestead character, no mere removal of the dependent members of the family, by death, marriage, or withdrawal, will obliterate the stamp. In other words, while no man can become a homesteader without being the head of a family, he may cease to be the head of a family without ceasing to be a homesteader.[1] On the other hand, the right to claim exemption may be waived, or the premises may be abandoned as a home. But where the statute prescribes the form of waiver, no expression of intention, however relied upon, will be effectual, unless there is a substantial compliance with the terms of the statute.[2] The question of abandonment is one of combined residence and intention. Temporary absence for purposes of health, pleasure, or business will not work an abandonment;[3] but departure with the intention of giving up the use of the premises as a *bona fide* home and place of permanent abode obliterates the homestead character.[4]

§ 601. **Conveying and incumbering the Homestead.** — Not only do the statutes protect the homestead against the attacks of creditors, but they generally prescribe that it shall only be conveyed with the consent of the wife, where the relation of husband and wife exists. Such provisions, whether they relate to the mode in which the consent must be evidenced, as by the joint conveyance of husband and wife, or to the neces-

[1] See *ante*, § 547, note.

[2] Kneetle *v.* Newcomb, 22 N. Y. 249; Moxley *v.* Ragan, 10 Bush, 156; Curtis *v.* O'Brien, 20 Iowa, 376; Recht *v.* Kelly, 82 Ill. 147; Branch *v.* Tomlinson, 77 N. C. 388; Levicks *v.* Walker, 15 La. Ann. 245; Carter *v.* Carter, 20 Fla. 558.

[3] Tumlinson *v.* Swinney, 22 Ark. 400; s. c. 76 Am. Dec. 432; Hitchcock *v.* Misner, 111 Mich. 180; s. c. 69 N. W. Rep. 226; Pitney *v.* Eldridge, 58 Kan. 215; s. c. 48 Pac. Rep. 854; Murphy *v.* Farquhar, 39 Fla. 350; s. c. 22 So. Rep. 681; Imhoff *v.* Lipe, 162 Ill. 282; s. c. 44 N. E. Rep. 493.

[4] Ross *v.* Hellyer, 26 Fed. Rep. 413; Cotton *v.* Hamil, 58 Iowa, 594; s. c. 12 N. W. Rep. 607; Smith *v.* Bunn, 75 Mo. 559; Jarvais *v.* Moe, 38 Wis. 440; Kuhnert *v.* Conrad, 6 N. Dak. 215; s. c. 69 N. W. Rep. 185; Carrigan *v.* Rowell, 96 Tenn. 185; s. c. 34 S. W. Rep. 4. The renting of a homestead does not necessarily constitute an abandonment. McClenaghan *v.* McEachern, 47 S. C. 446; s. c. 25 S. E. Rep. 296; Pitney *v.* Eldridge, 58 Kan. 215; s. c. 48 Pac. Rep. 854.

sity for and mode of acknowledgment, must be strictly followed, or the deed will be void[1] as a conveyance of the homestead, and even as to other lands attempted to be conveyed, unless they can be separated from the homestead.[2]

§ 602. **Streets as affecting Homestead.** — Where, as is generally the case, the act restricts the homestead to "one piece" or a "single tract" of land, the amount of land which may be claimed as exempt may or may not be affected by streets or highways running through the land. If the highway has the effect of dividing the land into two tracts, that portion which is cut off from the dwelling-house is deprived of its homestead character. The question is to be determined in each case by inquiring who is the owner of the fee of the highway. If the fee is in the homesteader, subject only to the public easement or right of way over it, the whole of the land constitutes but a single parcel, notwithstanding such easement. But where the several portions claimed as a homestead are separated by a street, the fee of which is in the State, then they are not contiguous, for they are separated by land in which the homesteader has no title or interest, and they do not constitute a single parcel.[3]

§ 603. **Equities of Creditors.** — It may be stated, as a general rule, that the existence of the exemption prevents any equities from arising in favor of judgment creditors enforceable as against the homestead. Thus, no equity arises in favor of creditors whose judgments are not a lien on the homestead to have the assets marshalled as against one having a specific lien on the homestead.[4] Moreover, as the creditors have no right to subject the homestead to a payment of their debts, they cannot be defrauded by any voluntary conveyance thereof; provided such conveyance is in good faith and not upon a

[1] McGhee *v.* Wilson, 111 Ala. 615 ; s. c. 20 So. Rep. 619; s. c. 56 Am. St. Rep. 72 ; Stallings *v.* Hullum, 89 Tex. 431 ; s. c. 35 S. W. Rep. 2 ; Phillips *v.* Stanch, 20 Mich. 369 ; McHugh *v.* Smiley, 17 Neb. 626 ; s. c. 20 N. W. Rep. 296 ; Thomas *v.* Fulford, 117 N. C. 667 ; s. c. 23 S. E. Rep. 635.

[2] Sammon *v.* Wood, 107 Mich. 506 ; s. c. 65 N. W. Rep. 529.

[3] Randall *v.* Elder, 12 Kan. 257 ; Binzel *v.* Grogan, 67 Wis. 147 ; Griswold *v.* Huffaker, 48 Kan. 374 ; s. c. 29 Pac. Rep. 693. Two tracts of land touching only at a corner do not constitute one body. Kresin *v.* Man, 15 Minn. 116; Linn Co. Bank *v.* Hopkins, 47 Kan. 580.

[4] *Ex parte* Kurz, 24 S. C. 468 ; Shell *v.* Young, 32 S. C. 462.

secret trust to hold for the grantor after he has ceased to use the property as a homestead.[1] And upon principle, and by the great weight of authority, it is not a fraud on creditors for a debtor to use personal property which is subject to legal process to acquire or improve a homestead which is exempt.[2]

§ 604. **Necessity for examining the Statutes.** — Further than the few foregoing principles which have been generally accepted by the courts, an examination of the subject would require a complete digest of the statutes — something entirely beyond the scope of this work. The reader is therefore referred for more extended information to the homestead acts of the several States and the various monographic works on "Homestead," for the amount of land, either in value or in acreage, which can be exempted, and the formalities, by way of declaring, recording, etc., if any such are required, which must be observed as conditions precedent to the exemption.]

[1] Bump on Fraudulent Conveyances (3d ed.), 245.

[2] Bump on Fraudulent Conveyances (3d ed.), 245; Randall *v.* Buffington, 10 Cal. 491. *Contra*, Pratt *v.* Burr, 5 Biss. 36; Brackett *v.* Watkins, 21 Wend. 68; Rose *v.* Sharpless, 33 Gratt. 153.

CHAPTER XIX.

ESTATES FOR YEARS.

§ 605. History of terms for years.
606. History, continued — Present action of ejectment.
607. Estates for years embrace what.
608. Creation and character.
609. The "term."
610. Terms to commence *in futuro*.
611. Terms must be for a certain time.
612. Tenant not seised.
613. Of *interesse termini* and leases by uses.
614. Ejectment against landlord withholding possession.
615. How far possession necessary to perfect lease.
616. Lessee not taking possession liable for rent.

§ 605. **History of Terms for Years.** — Next in importance in the admeasurement of estates, to those of freehold, are those for years. But so far are these from being derived from the feudal law, or known as estates to that system, that the tenant, at first, was not regarded as the owner of any interest in land which he could claim as such, but he depended upon the personal agreement of the freeholder for his right to occupy the same. The account given by a modern writer upon conveyancing, is, that leases for years, at will, or at sufferance, were originally granted to mere farmers or husbandmen, who, every year, rendered some equivalent in money, provisions, or other rent to the lessors or landlords. But the latter, in order to encourage them to manure or cultivate the ground, gave them a sort of interest for a limited period, founded upon a contract express or implied, which was not determinable at their will, but which should endure for a time certain. Their possession, nevertheless, was esteemed of so little consequence that they were considered as bailiffs or servants of the lord, holding possession of the land *jure alieno* and not *jure proprio*, who were to receive, and who had contracted to

account for, the profits at a settled price, rather than as having any property of their own. About the time of Edward I., estates for years seem to have become of importance, and to have been considered, after entry made, as actual interests in the land vested in the lessee.[1] It will be recollected that prior to the statute *Quia Emptores* (18 Edw. I.), the owners of lands in fee could not freely alien the same, but resorted to the custom of subinfendation, as it was called, by which, while they continued to hold of their superior lord, they created a tenure between themselves and the tenants whom they permitted to occupy their lands upon such services as they saw fit to prescribe, which were payable to themselves. But unless the owner of the feud created a freehold interest in the one to whom he gave the right of occupation, it was not considered in law as an *estate*, but a mere agreement by which, if the occupant was deprived of the possession of the land, his only remedy was by an action for a breach of such agreement. A mode of regaining possession by a tenant, as one having an estate in the land, was only accomplished by a succession of remedial acts. A form of action of covenant was the first devised, whereby the tenant might demand his *term* as well as damages, but could only maintain it against his immediate covenantor. In the time of Henry III., the writ of *quare ejecit infra terminum* was framed, which lay against any one in possession of the land, and upon a judgment in the termor's favor, he recovered possession of the land itself. But this writ did not reach a case where a stranger had entered and tortiously ousted the tenant, and in such cases, his only remedy was, to sue for possession in the name of his lessor. In the time of Edward III. the writ of *ejectment*, substantially like that now in use, was invented, and so shaped as to enable the tenant of a term to recover it, when deprived of the possession of the premises leased. And in this way, at last, tenants for years were placed upon the same level with freeholders, in regard to the security of their estates, and their remedy for recovering them if dispossessed thereof.[2] As

[1] 1 Powell, Ed. Wood, Conv. pp. iv–vi. See also Maine, Anc. L. 275.

[2] Smith, Land. & Ten. 8–12; 1 Reeves, Hist. Eng. Law, 341; Bacon, Abr. Leases; Doe *v.* Errington, 7 Ad. & E. 750; Adams, Eject. 8.

an estate in lands, however, a tenancy for years has long been familiar to the common law, and, as a contract, seems to have been well known as early as the reign of Edward I. from the language of the statute above referred to, though it is still held to be not a freehold estate but a chattel interest.[1]

§ 606. **History, continued — Present Action of Ejectment.** — But it was not before the time of Henry VI. that the plaintiff in ejectment recovered the term. At and after that time he recovered this, and with it the possession of the land, if his term had not expired; and, if it had elapsed, he recovered damages. When it became established that the term should be recovered, "the ejectment was *licked* into the form of a real action, the proceeding was *in rem*, and the thing itself, the term, only was recovered, and nominal damages, but not the mesne profits."[2] Ejectment is the form of action now retained in use in England under the statute of 3 & 4 Wm. IV. c. 7, § 36, which abolished all other forms of real actions except dower and *quare impedit*.[3] It is in general use in some form in this country, and by it the plaintiff recovers, if at all, upon the strength of his own title, and not upon the weakness of that of the tenant, since possession is deemed conclusive evidence of title as to all persons except such as can show a better one.[4]

§ 607. **Estates for Years embrace** such as are for a single year, or for a period still less if definite and ascertained, as a term for a fixed number of weeks or months, as well as for any definite number of years, however great.[5] This was held in respect to a parol letting of premises for the term of one year, although the rent was payable in grain to be raised upon a certain parcel of the premises during that year.[6]

§ 608. **Creation and Character.** — An estate for years is one that is created by a contract, technically called a lease, whereby one man, called the lessor, lets to another, called

[1] Com. Dig. Land. & Ten. 5.

[2] Goodtitle *v.* Tombs, 3 Wils. 120; Campbell *v.* Loader, 3 Hurlst. & C. 527, n.

[3] *Ante*, § 467.

[4] Hague *v.* Porter, 45 Ill. 318.

[5] Burton, Real Prop. § 863; 2 Flint. Real Prop. 200; Smith, Land. & Ten. (ed. 1856) 14; Brown *v.* Bragg, 22 Ind. 122; People *v.* Goelet, 64 Barb. 476.

[6] Gould *v.* School District, 8 Minn. 427, 431.

the lessee, the possession of lands or tenements for a term of time fixed and agreed upon by the parties to the same.[1] By this something more is implied than a mere grant of a certain interest in land; it involves a contract, more or less explicit, as to the terms and conditions upon which the same is to be held and managed; and this contract, in some form, is incident to every proper leasehold estate.[2] Nor is it, perhaps, easy to describe more definitely what the lessee acquires by this lease, since, being so much the creature of contract, there are not, as in other estates, uniform incidents belonging to terms for years, which, necessarily and as a matter of course, pass with them. The lessee does not own the soil and freehold, and has only a limited property in it. But, within these limits, he is the owner of the possession and profits of it, and of all the use that can be made of it during the continuance of his term. Thus, where one hired a store upon the outer wall of which persons posted advertisements and paid for the privilege, it was held to be his perquisite and not that of the lessor. The lessee may use such wall to hang his sign or an awning upon, to the exclusion of the lessor.[3] What these limits are may be fixed by the agreement of the parties, or is implied by law from the nature of the estate. Within these limits, the estate of a tenant for years ranks with that of a freeholder in regard to stability of enjoyment.[4] The use and products of the premises are his. In other words, he has an *estate* in the demised premises for the term prescribed in his lease, and if deprived of the possession and enjoyment thereof, the law supplies a remedy by which he may regain these specifically, instead of recovering damages only for the violation of a contract right.[5] In some cases, a

[1] Smith, Land. & Ten. 18; Com. Land. & Ten. 4.

[2] Sanders *v.* Partridge, 108 Mass. 556; 7 Am. Law Rev. 240. From this twofold character of a lease, as at once an estate and a contract, arises the double privity of estate and contract. Ibid.

[3] Riddle *v.* Littlefield, 53 N. H. 503. The lease of a "store" includes land under it and to the middle of a private way owned by a lessor. Hooper *v.* Farnsworth, 128 Mass 487. So a lessee is entitled to hold as leased the land gained by accretion during his term. Cobb *v.* Lavalle, 89 Ill. 331.

[4] Platt, Leases, 5. The extent of a demise may be qualified by implication from the limited character of the lessor's interest. Booth *v.* Alcock, L. R. 8 Ch. App. 663.

[5] Co. Lit. 345 *a*; Bouvier, "Estate for Years;" Stearns, Real Act. 53.

lease may be presumed to have been made from long possession of lands, as other deeds, and grants are sometimes presumed under similar circumstances.[1] It is customary to provide in the lease, by stipulation, that the lessee shall pay to the lessor money or other consideration in the way of rent or return, for the use of the premises.[2] But the reservation of rent is not essential to the validity of a tenancy for years by lease.[3]

§ 609. **The "Term."** — As an estate for years, as above explained, necessarily implies a certain and definite period for which possession is to be held, it has acquired a designation proper to this character; namely, that of a *term*, derived from *terminus*, signifying that it is bounded and precisely determined, having a certain beginning and a certain end.[4] And a lease for years from the first day of July begins the term on the second day, and lasts through the anniversary of the day from which it is granted.[5] But as this word *term* may express not only the duration of the interest of the lessee in the lands leased, but also the interest itself, it may often be so used that this last shall expire before the number of years mentioned in the lease.[6] And whether the one sense or the other is to be attached to the form of expression depends upon

[1] Carver *v.* Jackson, 4 Pet. 184. A more expressive term perhaps might be "a leasehold estate," or "a tenancy for years," as it is not intended to embrace, in this chapter, estates for years created by way of particular estates in case of remainders or executory devises, which are not created by a letting and hiring, but by grant or devise.

[2] Allen *v.* Lambden, 2 Md. 279.

[3] Failing *v.* Schenck, 3 Hill, 344; State *v.* Page, 1 Speers, 408; Knight's Case, 5 Rep. 55 *a*; 1 Platt, Leases, 9.

[4] 2 Flint. Real Prop. 203; Wms. Real Prop. (Rawle's ed.) 328.

[5] Atkins *v.* Sleeper, 7 Allen, 487; Ackland *v.* Lutley, 9 Ad. & E. 879. Whether the word "from" shall be reckoned to include or exclude the date depends on the apparent intent, gathered from the instrument. Thus, where in a lease for five years "from" April 1st, the rent was made payable on April 1st, that day was included, Devo *v.* Bleakly, 24 Barb. 9; but if nothing controls the force of this word, it excludes, Bemis *v.* Leonard, 118 Mass. 502; Pugh *v.* Leeds, Cowp. 714; Sheets *v.* Selden, 2 Wall. 190; Ordway *v.* Remington, 12 R. I. 319. Where a term was from an act as of delivery, the day of the act is, in New Hampshire, Pennsylvania, Indiana, Illinois, Kentucky, and perhaps some other States, included; but the more generally prevailing rule is to exclude it. Taylor, Land. & Ten. (8th ed.) §§ 78, 79, notes; and *post*, §§ 811, 812.

[6] Burton, Real Prop. § 835; Co. Lit. 45 *b*.

the construction of the instrument containing it. Thus the case put by Coke, in the passage cited,[1] is of a lease for twenty-one years, and afterwards a second lease to begin at the expiration of the *term* aforesaid of twenty-one years. If the first lessee surrenders his estate, the second lease would take effect at once. But if the second lease had been from the expiration of the twenty-one years aforesaid, it would have to wait the efflluxion of the whole term mentioned. A case similar in effect is put in Sheppard's Touchstone,[2] which is cited and commented on by Lord Mansfield, who says, "the word *term* may signify the time as well as the interest, for then it becomes merely a question of construction, which sense the word ought to be used in."[3] And where a lease was made to A B for a year, with liberty in the lessee to occupy as long as he chose, and a surety became responsible with him for the rent, it was held that if the tenant continued to occupy after the year, it would be at the rate and upon the terms originally agreed upon, but that the surety's responsibility, unless renewed, continued only during the first *term of one year.*[4]

§ 610. **Terms to commence in Futuro.** — A term for years may be created to take effect at a future date, since it affects the possession only and not the seisin of the lands. Nor is there any limit within which the term must take effect, in order to be valid, provided the period do not reach that which constitutes what the law calls a *perpetuity*, that, namely, of a life or lives in being, and twenty-one years and a fraction of a year afterwards.[5] But a covenant in a lease for its renewal indefinitely, at the option of the lessee, is not within the doctrine of perpetuity.[6] As the title and estate of such lessee

[1] Co. Lit. 45 *b*.

[2] Sheppard, Touchst. 274.

[3] Wright *v.* Cartwright, 1 Burr. 284; Evans *v.* Vaughan, 4 B. & C. 261; where under a power to lease for years, determinable on three lives, the lease was for the three lives with a covenant of quiet enjoyment during said term, it was held to mean during the whole period of the three lives.

[4] Brewer *v.* Thorp, 35 Ala. 9.

[5] Burton, Real Prop. § 836; Sand. Uses, 199; Wms. Real Prop. 328; Cadell *v.* Palmer, 1 Cl. & F. 372; Field *v.* Howell, 6 Ga. 423; Whitney *v.* Allaire, 1 N. Y. 315; Weld *v.* Traip, 14 Gray, 330, 333.

[6] Page *v.* Esty, 54 Me. 319; Blackmore *v.* Boardman, 23 Mo. 420; Boyle *v.*

is not consummate until he has taken possession under his lease, the interest which he has in the same, prior to such consummation, is called an *interesse termini*.[1] But in Ohio the execution and delivery of a lease perfects the title in the lessee without an actual entry.[2] Although a lease is said generally to take effect from the time of its making, it is apprehended that the time at which only it takes effect is when it is delivered. It is unimportant when it was written, and it is competent to show, by parol, when it was delivered, although no date, or a different one from that of its actual delivery, was inserted in the indenture.[3] And though the purpose of the *habendum* is to fix, for one thing, the time from which the duration of the term of the holding under the lease is to be reckoned, yet where it professes to do this by a reference to the making of the lease, the true time may be shown by parol. Thus, where a lease purported to bear date March, 1783, *habendum* from "March last past" for thirty-five years, it was held competent to show by parol that the lease was not executed until after March, 1783, and consequently the *habendum* was from that year and not 1782.[4] But where the holding is to be "from the day of the date," its duration will be measured from that day as written, and not from the day of its execution, if these are in fact variant.[5] But if the day named as the commencement of the holding, or of the term, be anterior to the date and actual execution of the lease, no interest thereby passes to the lessee until the actual execution and delivery of the lease, the purpose of the *habendum* being to

Peabody H. Co. 46 Md. 623 ; and will be enforced in equity, Iggulden *v.* May, 9 Ves. 925 ; Banks *v.* Haskie, 45 Md. 207. In an early case in California the opposite doctrine was stated, Morrison *v.* Rossignol, 5 Cal. 64 ; but this turned on a special statute. The act of renewal is no new demise. House *v.* Burr, 24 Barb. 625 ; Brown *v.* Parsons, 22 Mich. 24. The rule is, of course, the same where the further term is at the lessee's option by occupancy merely. Holley *v.* Young, 66 Me. 520 ; Sweetser *v.* McKenney, 65 Me. 225.

[1] 2 Flint. Real Prop. 204, 205 ; Wms. Real Prop. 329 ; Smith, Land. & Ten. 13.

[2] Walk. Introd. 278.

[3] Hall *v.* Cazenove, 4 East, 477, 481 ; Trustees *v.* Robinson, Wright (Ohio), 436 ; Stone *v.* Bale, 3 Lev. 348 ; Co. Lit. 46 *b* ; Jackson *v.* Schoonmaker, 2 Johns. 230 ; Batchelder *v.* Dean, 16 N. H. 265, 268.

[4] Steele *v.* Mart, 4 B. & C. 272 ; Co. Lit. 46 *b*.

[5] Smith, Land. & Ten. 83, n. ; Styles *v.* Wardle, 4 B. & C. 908 ; Doe *v.* Day, 10 East, 427 ; Co. Lit. 46 *b* ; Kelly *v.* Patterson, L. R. 9 C. P. 681.

mark the duration of the lessee's interest.[1] Accordingly, it was held in respect to a lease made and dated in July, 1851, demising the premises for fourteen years from December, 1849, with a right to determine it at the expiration of seven years, that this term of seven years was to be reckoned from 1849.[2]

§ 611. **Terms must be for a Certain Time.**—It seems to be regarded as essential to a good lease for years that it should be either for a certain period, measured by years, months, or the like, or for a period uncertain only from the circumstance that it may be determined before its natural expiration by the happening of some event, or that it be for a purpose which, of itself, serves to ascertain the length of time for which the premises are to be held. Thus Littleton says, "Tenant for term of years is where a man letteth lands or tenements to another for term of certain years."[3] And the illustrations given by Coke are, if a man shall make a lease to J S for so many years as J N shall name, it is a good one, for, when J N has named the number of years, the duration of the term becomes fixed. If the lease be to J S for twenty-one years, if he live so long, it is a good one.[4] But a lease by a parson for so many years as he shall be parson of Dale, or so many years as he shall live, would be not only for an uncertain time, but it never could be made certain so as to be valid as a term.[5] And though it might be good as a freehold estate, if properly made by deed, it could not be good as a term under a lease. But a devise to A during his minority would be good, as it is susceptible of being ascertained in respect to its duration.[6] So upon the principle that *id certum*

[1] Shaw *v.* Kay, 1 Exch. 412; Wybird *v.* Tuck, 1 Bos. & P. 458; Mayo *v.* Beak, Cro. Eliz. 515.

[2] Bird *v.* Baker, 1 Ellis & E. 12.

[3] Lit. § 58.

[4] Goodright *v.* Richardson, 3 T. R. 462. So if for a term fixed but determinable on sale, etc., by the landlord. Munigle *v.* Boston, 3 Allen, 230; Shaw *v.* Hoffman, 25 Mich. 162.

[5] Co. Lit. 45 *b*; 2 Prest. Conv. 159; 2 Flint. Real Prop. 203; Murray *v.* Cherrington, 99 Mass. 229. Whether a lease for so many years as the lessor himself may name would become a fixed term if he were to name a certain number of years, *quære*. West. Transp. Co. *v.* Lansing, 49 N. Y. 499, 508.

[6] Smith, Land. & Ten. 15; Burton, Real Prop. § 487.

est quod certum reddi potest, a lease for seven or fourteen years will be good as one for seven at least, and for fourteen as soon as the lessee shall so elect.[1] And if a lease be to one for a year, with a privilege of holding for three years, and he continues to hold after the expiration of the first year, it will be held to be an election on his part to hold for the three years.[2] And a lease for one year, and so on from year to year, is regarded as one for two years, and a lease "for years," without any number fixed, is for two years certain.[3] It is apprehended that it is upon the idea that the term for which the estate is to be held, can be ascertained, by computing how long it will require the income thereof to raise a given sum, that an executor takes an estate for years under a devise of lands for the payment of debts, or until the devisor's debts are paid.[4] And a lease of premises until the lessee shall, out of the rents, repay himself for a certain amount of expense incurred by him in repairs, was held to be a sufficiently definite term to be a valid one.[5] The only circumstance required in these limitations of terms of years is, that a precise time shall be fixed for the continuance of the term, so that when the commencement of the term is ascertained, the period of determination by effluxion of time may be known with certainty.[6] And it was held by the court of Vermont, that an instrument with the usual features and incidents of a lease, such as reserving rent, with a right of entry for non-payment of it, or for breach of conditions expressed therein, may be good if properly executed, although in terms creating a perpetual estate in the premises.[7] And in Massachusetts, it was held that one might

[1] Doe *v.* Dixon, 9 East, 15.

[2] Delashman *v.* Berry, 20 Mich. 292; Kramer *v.* Cook, 7 Gray, 550; Clarke *v.* Merrill, 51 N. H. 415; Dix *v.* Atkins, 130 Mass. 171. But it is otherwise if written notice is first to be given. Beller *v.* Robinson, 50 Mich. 264.

[3] Denn *v.* Cartright, 4 East, 29; Com. Dig. Land. & Ten. 91, 92.

[4] 1 Cruise, Dig. 223. But it has been held that an instrument granting premises "for any term of years" the lessee might think proper, taken in connection with the uses for which they were to be applied, namely, salt works, is a valid lease for a term determinable upon the lessee's abandoning that manufacture. Horner *v.* Leeds, 25 N. J. 106; and see Lemington *v.* Stevens, 48 Vt. 38.

[5] Batchelder *v.* Dean, 16 N. H. 265, 268.

[6] 2 Prest. Conv. 160.

[7] White *v.* Fuller, 38 Vt. 193.

convey a fee in land in the form of a lease, although, ordinarily, applied to the creation of terms only.[1]

§ 612. **Tenant not seised.** — A tenant for years is never said to be *seised* of the lands leased; nor does the mere delivery of a lease thereof for years vest in him any estate therein. He thereby acquires a right of entry upon the land, and when he shall have entered, he is said to be possessed, not of the land, but of a term for years, while the seisin of the freehold remains in the lessor, and the lessee's possession is the possession of him who has the freehold.[2]

§ 613. **Of Interesse Termini and Leases by Uses.** — Until the lessee entered upon the leased premises, he was formerly held to acquire no *estate* in the same. The interest which he acquired by the delivery of the lease, and before entry made, is, as already stated, called an *interesse termini;* and accordingly Littleton, in defining what is a tenancy for years, after stating that it "is awarded between lessor and lessee," adds, "And the lessee entereth by force of the lease."[3] And if the lessee die before entry, his executors or administrators may enter in his stead.[4] But while the lessee, until he shall have taken possession, cannot have trespass *quare clausum fregit* against a stranger,[5] an entry is held not necessary to the vesting of a term of years in him.[6] And a lease may be so made, where a sufficient consideration is expressed, as having been executed or paid, and it is in the form of a bargain and sale, as to operate, under the statute of uses, as an effectual

[1] Jamaica Pond Co. *v.* Chandler, 9 Allen, 159, 168; Co. Lit. 43 *b*. Such are, also, the so-called manor leases in New York and the fee-farm leases in Pennsylvania. See Van Rensselaer *v.* Hays, 19 N. Y. 68; Wallace *v.* Harmsted, 44 Penn. St. 492.

[2] 1 Cruise, Dig. 224; Lit. § 59; Vanduyn *v.* Hepner, 45 Ind. 589. But the tenant only, and not the landlord, can maintain trespass *quare clausum*. French *v.* Fuller, 23 Pick. 104; Austin *v.* Hud. Riv. R. R., 25 N. Y. 334; Geer *v.* Fleming, 110 Mass. 39.

[3] 1 Cruise, Dig. 225; Lit. § 58; Doe *v.* Walker, 5 B. & C. 111. Nor does it make any difference at common law whether the lessee has a present or future right of entry, until entry actually made. Ibid.; Co. Lit. 46 *b*; Bacon, Abr. Lease, M; Wood *v.* Hubbell, 10 N. Y. 479.

[4] Co. Lit. 46 *b*.

[5] Bacon, Abr. Lease, M; Smith, Land. & Ten. 13; Wheeler *v.* Montefiore, 2 Q. B. 133.

[6] Harrison *v.* Blackburn, 17 C. B. N. S. 678; Ryan *v.* Clark, 14 Q. B. 65, 73.

creation of an estate, without a formal entry. Thus, if the words "bargain and sale," in consideration of money, be contained in the lease, or in consideration of money, the lessor demises the premises, a use will arise in favor of the lessee. But if it be made without any money consideration, the lessee has not strictly an estate until entry made by him.[1] Before that has been done, he has only an *interesse termini*, but not a possession.[2] How this is made to produce this effect will be explained in connection with the law of uses.[3] But, it seems, that even when the lease takes effect under the statute of uses, it is necessary that the lessee should have made an actual entry before he could maintain trespass;[4] since such action is founded on an actual possession.

§ 614. **Ejectment against Landlord withholding Possession.** — It is also laid down by some writers, that a lessee, before entry made, cannot maintain an action of ejectment.[5] And regarding such action, as it was originally designed for the recovery of a term, where it was a writ of trespass in its nature,[6] the proposition may still be regarded as true. But, according to the modern mode of proceeding, the action being a fictitious one where the tenant is required to confess lease, entry, and ouster, it will doubtless be sufficient if the demandant has a title and right of entry.[7] And if the lease be future in its terms, the lessee by delivery of the lease acquires such an interest in the term, that he could maintain ejectment to recover it without any further act on his part, if possession were withheld when his right to claim it had become complete.[8]

§ 615. **How far Possession necessary to perfect Lease.** — This

[1] Birckhead *v.* Cummings, 33 N. J. 44.

[2] Wood's Conv. 157, 159; Co. Lit. 46 *b*.

[3] 1 Cruise, Dig. 225; 4 Kent, Com. 97; Bacon, Abr. Lease, M.

[4] Smith, Land. & Ten. 14, n.; Com. Dig. Trespass, B. 3; 1 Platt, Leases, 23; 2 Sand. Uses, 56.

[5] Bacon, Abr. Lease, M; Saffyn *v.* Adams, Cro. Jac. 61; 1 Platt, Leases, 23. But see Mechan. Ins. Co. *v.* Scott, 2 Hilton, 550.

[6] Adams, Eject. 6; 10.

[7] Adams, Eject. 14; 10, 61; Gardner *v.* Ketcltas, 3 Hill, 330; Trull *v.* Granger, 8 N. Y. 115; Tyler *v.* Heidorn, 46 Barb. 439; but see Sennett *v.* Bucher, 3 Penn. 392. And the proposition of the text is doubtless true under statutes which have abolished the fictitious scaffolding of the common law action.

[8] Whitney *v.* Allaire, 1 N. Y. 305, 311.

interesse termini, however, may be granted or assigned by the lessee,[1] but upon technical grounds, the subtleness of which renders it hardly worth the time to attempt to explain them, it cannot be surrendered, though it may be extinguished by a surrender by law, or by an assignment, or by a release, while it can neither promote nor hinder the merger of an estate.[2] These propositions may perhaps be sufficiently illustrated by the following cases: The lessee of a term to commence at the ensuing Michaelmas, took a new lease for years, commencing *in præsenti*, and it was held to be a surrender of the first lease. So had the new lease been made to take effect at Michaelmas. And where a lessor made a lease which was to expire in 1809, and then made a second lease of the same estate to the same lessee, to take effect at the expiration of the first, the last bearing date in 1799, and the lessor, in 1800, died, having devised the leased estate for life to the lessee, who conveyed his life estate before 1809, it was held that this interest of the lessee, in the term to commence in 1809, was not merged in the life estate which he took under the will, because the two estates were not in him at the same time, as the *interesse termini* was not an estate till entry made, and, before that could be done, he had parted with his life estate.[3] It should have been remarked that the rules which apply to an *interesse termini* at common law apply equally to all leases to commence *in futuro*.[4] And where A made a lease to B of a hotel for a term of years, from a future day, and before that day it burned down, it was held that the lease never took effect so as to make the lessee liable for rent. The lessor must give, or offer to give, possession of the premises, in order to create any liability for the rent, and it matters not whether he cannot or will not do this. So where the owner of a hall agreed with another to furnish him the use of it for a concert upon certain nights, for a certain agreed sum of money, and the hall was burned before the first of these nights, it was held to excuse both parties respectively from performing the contract, unless the owner of the hall had expressly agreed to assume

[1] Co. Lit. 46 *b*; 1 Platt, Leases, 22.

[2] Burton, Real Prop. §§ 907, 998; 2 Prest. Conv. 215; Co. Lit. 338 *a*; Doe *v.* Walker, 5 B. & C. 111. See 4 Kent, Com. 97, note *a*.

[3] Doe *v.* Walker, 5 B. & C. 111; Sheppard, Touchst. 324; Co. Lit. 270 *a*.

[4] Doe *v.* Walker, 5 B. & C. 111; 4 Kent, Com. 97.

the risk of providing it. The court would apply the same rule to such a contract as to an agreement by one man to serve another who should die, or an agreement by an artist to paint a picture and he should lose his sight before executing it.[1] In either event he is without remedy for the rent reserved.[2] But it is no answer to a claim for rent, that the premises are in the possession of another, unless held by a title paramount to that of the lessor, since by the act of letting the premises, the lessor does not warrant against the acts of strangers, nor does he engage to put the lessee into actual possession.[3] But where the lessor himself has only a reversion or remainder, subject to an intermediate particular estate, a lease by him will be considered as a conveyance of so much of his estate in reversion or remainder, and not the creation of an *interesse termini*.[4]

§ 616. **Lessee not taking Possession liable for Rent.** — A forbearance on the part of a lessee for years to turn his *interesse termini* into an actual estate by making an entry, will not affect his liability for rent, if the fault is not on the part of the lessor, for the rent becomes due by the lease, and not by the entry or by occupation,[5] and the action is upon the covenant as for a breach of an executory covenant;[6] and, though the lessor may die before lessee enters under his lease, he may do so after the lessor's death, at his pleasure.[7]

[1] Taylor *v.* Coldwell, 3 Best & S. 826.

[2] Wood *v.* Hubbell, 5 Barb. 601; s. c. 10 N. Y. 479, 487, 489.

[3] Mechan. Ins. Co. *v.* Scott, 2 Hilton, 550. A contrary rule prevails in England and some States, and the lessor is held to warrant possession to the lessee, "and not merely the chance of a lawsuit." Coe *v.* Clay, 5 Bing. 440; Jenks *v.* Edwards, 11 Exch. 775; L'Hussier *v.* Zallee, 24 Mo. 13; Hughes *v.* Hood, 50 Mo. 350; King *v.* Reynolds, 67 Ala. 229. But the rule in the text generally prevails in this country. Clark *v.* Butt, 26 Ind. 236; Trull *v.* Granger, 8 N. Y. 115; Moore *v.* Weber, 71 Penn. St. 429; Pendergast *v.* Young, 21 N. H. 234; Sigmund *v.* Howard Bk., 29 Md. 324; Underwood *v.* Birchard, 47 Vt. 305; Gazzolo *v.* Chambers, 73 Ill. 75; Field *v.* Herrick, 101 Ill. 210.

[4] Doe *v.* Brown, 2 El. & Bl. 331.

[5] Bellasis *v.* Burbriche, 1 Ld. Raym. 171; s. c. Rep. temp. Holt, 199; 1 Platt, Leases, 23; Maverick *v.* Lewis, 3 McCord, 211; Williams *v.* Bosanquet, 1 Brod. & B. 238; Mechan. Ins. Co. *v.* Scott, 2 Hilton, 550; Whitney *v.* Allaire, 1 N. Y. 305, 311.

[6] Lafarge *v.* Mansfield, 31 Barb. 345. By a statute of Illinois, the lessor has a lien for rent upon the crops growing or grown upon the demised land in any year, for the rent of that year, and this will extend over two years in respect to such crops as require that length of time to mature them. Miles *v.* James, 36 Ill. 399.

[7] Lit. § 66; Co. Lit. 51 *b*.

CHAPTER XX.

ESTATES FOR YEARS — HOW CREATED.

§ 617. Creation of estates for years at common law — Under the statute of frauds.
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§ 617. **Creation of Estates for Years at Common Law — Under the Statute of Frauds.** — There were three modes of creating an estate for years at the common law, namely, by deed, by writing not under seal, and by parol,[1] though, if it was of an incorporeal hereditament, it was always requisite to be done by deed,[2] and

[1] Smith, Land. & Ten. 60 ; Den *v.* Johnson, 15 N. J. 116.
[2] Wms. Real Prop. 195 ; id. 327.

by the statute 8 & 9 Vict. c. 106, leases of corporeal as well as incorporeal property must be by deed.[1] The statute of 29 Car. II. c. 3, called the statute of frauds, which, with some modifications, has been adopted by nearly all the several States, declared, among other things, that all leases for more than three years, "not put in writing and signed by the parties," etc., should have the force and effect of estates at will only.[2] But as terms were coupled with estates of freehold, which required a deed to create them, the question arose whether a lease of a term must not also be by deed. But it seems to be settled that it will be sufficient that such a lease is in writing, though not under seal, to comply with the requirements of that statute.[3] The laws of the various States vary in respect to leases being by deed. In most of them it is enough that the instrument be properly subscribed. In Virginia and Kentucky, if the lease be for more than five years, it must be under seal. So in Vermont and Rhode Island, if it exceed one year.[4] So in Minnesota, if it be for three years or more.[5] A lease for ninety-nine years in Maryland must be by deed.[6] And a lease of a married woman's estate in Pennsylvania, for any term, to be valid, must be acknowledged by her, separate from her husband.[7] In New Hampshire signing only is necessary.[8] In Ohio, the lease, if for more than three years, must be attested by two witnesses and acknowledged.[9] In Massachusetts, if it be for more than

[1] Wms. Real Prop. 196 ; Smith, Land. & Ten. 66, n. 9.

[2] The English statute period is adopted in New Jersey, Pennsylvania, North and South Carolina, Maryland, Georgia, and Indiana. In Massachusetts, Maine, New Hampshire, Vermont, Missouri, and Ohio all parol leases are at will. But in New York and most other States they are valid if not exceeding one year. Browne, Stat. Fr. App.

[3] Den *v.* Johnson, 15 N. J. 116 ; Allen *v.* Jaquish, 21 Wend. 628 ; Wheeler *v.* Newton, Prec. in Ch. 16. A lessor would not be entitled to sue for and recover from the lessee his part of the indenture of lease before the expiration of the term, although he may have entered and dispossessed the lessee for a breach of covenant and condition. On the other hand, if he gets possession of the lessee's part, he may have an action to recover the same from the lessor. Hall *v.* Ball, 3 Mann. & G. 242 ; Elworthy *v.* Sanford, 3 Hurlst. & C. 330.

[4] Taylor, Land. & Ten. § 34. Five years. Stewart *v.* Apel, 5 Houst. 189.

[5] Chandler *v.* Kent, 8 Minn. 524, 526.

[6] Bratt *v.* Bratt, 21 Md. 578.

[7] Miller *v.* Harbert, 25 Leg. Int. 29.

[8] Olmstead *v.* Niles, 7 N. H. 522, 526.

[9] Richardson *v.* Bates, 8 Ohio St. 257, 260.

seven years, it must be by deed, and, in order to be valid against third persons without notice, it must be recorded.[1]

§ 618. **Statute of Frauds — Signing by Agent.** — The first section of the statute of frauds requires the writing which is sought to be availed of as a lease, to be "signed by the parties, etc., making the same, or their agents thereunto lawfully authorized by writing." In some of the States the appointment of the agent is not required to be in writing, while in others the English rule upon the subject is copied and adopted.[2] * A question growing out of these statutes has arisen as to the mode of signing leases when done through an agent in the actual presence of the lessor, and by his direction. In South Carolina, the court of appeals were equally divided upon the point, a part holding that if an instrument is signed by a person in the presence of another, in the name and by the express direction of the latter, it is a good signing of the party himself at common law, and that the statute did not intend to extend to cases like this. But the other part of the court applied a strict construction to the language of the act, and regarded an agent as no less an agent while acting in presence of his principal than he would be in his absence.[3] In Massachusetts, on the contrary, it has been held that a signature placed by a third person in the grantor's presence and by his direction, orally given, will be a valid execution of a deed.[4] It may be added, that if the signing is not by the party himself, but by his agent, it should be expressed as the act of the principal done by his agent; as A B, by his attorney, C D,[5] while merely signing the name of

* Note. — In the following States the English rule prevails: Alabama, Arkansas, Georgia, Maryland, Michigan, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Carolina, and Wisconsin, while in the others the requirement is either simply that it may be executed by a party or his "agent" or "attorney," or it adds "lawfully authorized," without stating how. In Connecticut it must be signed by the lessor, and in Delaware it must be done by deed.

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[1] Pub Stat. c. 120, § 4.

[2] See the statutes of the several States collected in the Appendix to Browne on the Statute of Frauds, 503–531. Cf. Jennings *v.* McComb, 112 Penn. St. 518.

[3] Wallace *v.* McCullough, 1 Rich. Eq. 426.

[4] Gardner *v.* Gardner, 5 Cush. 483; Wood *v.* Goodridge, 6 Cush. 117.

[5] Bacon, Abr. Lease, I. § 10; Opinion of Mr. Hoffman, 3 Am. Jur. 67; Elwell *v.* Shaw, 16 Mass. 42; *post*, § 2135 *et seq.*

the principal, as A B, without adding by whom done, would not be a good signing,[1] nor would it be if in the agent's own name.[2]

§ 619. **Terms to create Lease.** — In respect to the proper terms by which an estate for years may be created, any form of expression is sufficient if it shows an intention on the part of the lessor to part with and divest himself of the possession in favor of the lessee, and a corresponding intention on the part of the lessee to come into the possession of the premises for a determinate period of time. The words generally used for this purpose are, "grant," "demise," and "to farm let," some of which have a technical and extensive signification. "Do lease, demise, and let," in a lease, imports the creation of a term to begin presently, and not at a future day or upon a contingency.[3] But neither of them is indispensable to constitute a valid lease,[4] and even when adopted they may be controlled by the connection in which they are used.[5] It is indispensable,

[1] Wood *v.* Goodridge, 6 Cush. 117 ; 1 Am. Lead. Cas. (3d ed.) 579.

[2] Combe's Case, 9 Rep. 76 *b* ; 1 Am. Lead. Cas. (3d ed.) 579.

[3] So. Cong. Meeting House *v.* Hilton, 11 Gray, 409.

[4] Jackson *v.* Delacroix, 2 Wend. 433, 438 ; Wms. Real Prop. 327. "Agree to let," "agree to take," held to be words of present demise. Doe *v.* Ries, 8 Bing. 178, 182, per Tindal, C. J. ; Doe *v.* Benjamin, 9 Ad. & E. 644, 650, per Denman, C. J. So are "shall hold and enjoy." Doe *v.* Ashburner, 5 T. R. 163 ; Burton, Real Prop. § 838 ; Watson *v.* O'Hearn, 6 Watts, 362 ; Moshier *v.* Reding, 12 Me. 478 ; Moore *v.* Miller, 8 Penn. St. 272 ; Bacon, Abr. Lease, K.

[5] Putnam *v.* Wise, 1 Hill, 234, where, though the terms were those of a lease, it was held to constitute the parties tenants in common of the crops, the return for the occupation being a share of the crops. See Walker *v.* Fitts, 24 Pick. 191. But where A agreed to furnish house and tools, B to work the farm and deliver a part of the crop to A, the agreement was held to establish the relation of landlord and tenant. Schlicht *v.* Callicott, 76 Miss. 487 ; s. c. 24 So. Rep. 869 ; *post*, § 758. Doe *v.* Derry, 9 Car. & P. 494. A let to B his farm for seven years, and B at the same time in writing agreed to employ A to carry on the farm at certain wages, and to allow him to occupy the house free of rent ; it was held to be a contract for remuneration for services and not a demise of the house. So, where A gave B a bond conditioned to convey land on being paid a certain note on demand, with interest quarterly, and that the obligee should have possession of the same until such conveyance should be made, it was held to be a demise so long as B paid the interest on the note quarterly, and did not fail to pay the principal on demand, and that the tenancy created was not one at will. White *v.* Livingston, 10 Cush. 259. The permissive possession of a vendee before purchase is not a demise, but a bare license. Doe *v.* Stanion, 1 M. & W. 695, 700 ; Thompson *v.* Bower, 60 Barb. 463 ; Dunham *v.* Townsend, 110 Mass. 440 ; Taylor, Land. & Ten. (8th ed.) § 25 and note ; and this will be more fully considered *post*, c. 32. A contract for

however, that the lease should, by its terms, ascertain the premises intended to be demised, for, if defective in this respect, it cannot be made good by parol evidence.[1]

§ 620. **Distinction between Lease and Agreement to lease.** — Some of the most difficult questions under this head have been, whether the language of the parties is to be construed as a present demise or a contract for a future one. And whether it is the one or the other, depends upon the intention of the parties, as gathered from the whole instrument, rather than any particular form of expression in any particular part of the agreement, though, as a general proposition, if there are apt words of a present demise, followed by possession, the instrument will be held to pass an immediate interest.[2] The cases are numerous, and many of them apparently conflicting. Thus in Jackson *v.* Kisselbrack, the memorandum stated that L "hath set and to farm let" unto K, etc., but it contained a clause, "the place to be surveyed on or before, etc., ensuing the date," "and then K is to take a lease for the same." The court (Spencer, J.) say, "This last circumstance has generally given a character to the instrument of an agreement for a lease as contradistinguished from a present demise." But, it is added, "none of the cases will be found to contradict the position that where there are apt words of present demise, and to these is superadded a covenant for a future lease, the instrument is to be considered as a lease, and the covenant as operat-

lodging also is not a lease properly, see Cook *v.* Humber, 11 C. B. N. S. 33, 46; 7 Am. Law Rev. 253; White *v.* Maynard, 111 Mass. 250; and of course not where for board and lodging, ib.; Taylor, Land. & Ten. (8th ed.) § 66; Wilson *v.* Martin, 1 Denio, 602. But where the contract is a clear lease it does not lose this character, because it also contains an agreement to board at the lessee's option. Porter *v.* Merrill, 124 Mass. 534.

[1] Dingman *v.* Kelly, 7 Ind. 717.

[2] Hallett *v.* Wylie, 3 Johns. 44; Thornton *v.* Payne, 5 Johns. 74. In the latter case the judge, Spencer, says: "In every case decided in the English courts where agreements have been adjudged not to operate by passing an interest, but to rest in contract, there has been either an express agreement for a future lease, or construing the agreement to be a lease *in præsenti* would work a forfeiture, or the terms have not been fully settled, and something further was to be done." Jackson *v.* Delacroix, 2 Wend. 433; Burton, Real Prop. § 845; Warman *v.* Faithfull, 5 B. & Ad. 1042; Averill *v.* Taylor, 8 N. Y. 44; Baxter *v.* Browne, 2 W. Bl. 973; Morgan *v.* Bissell, 3 Taunt. 65; Wright *v.* Trevezant, 3 Car. & P. 441. See Weed *v.* Crocker, 13 Gray, 219; Hurlburt *v.* Post, 1 Bosw. 28.

ing in the nature of a covenant for further assurance." The agreement in that case, having been followed by possession, was held to be a present demise.[1] The question seems to turn upon whether the writing shows that the parties intend a present demise and parting with the possession by the lessor to the lessee, for, if it does, it will operate as a lease, though it is contemplated that a future writing should be drawn, more explicit in its terms. And it may be a good lease in distinction from an executory contract to lease, though it be to commence *in futuro*.[2] But if a fuller lease is to be prepared and executed before the demise is to take effect, and possession given, it is an agreement for a lease, and not a lease which creates an estate.[3] Thus, where it was covenanted between A and B "that A doth let the said lands for and during five years, etc., to begin, etc., provided that B shall pay to A annually during the term at, etc., £120, also, the parties do covenant that a lease shall be made and sealed according to the effect of these articles, before the Feast," etc., it was held to be a good present lease; "that which follows the demise is in reference to further assurance."[4] And it is said that acts and declarations of the par-

[1] Jackson *v.* Kisselbrack, 10 Johns. 336; Chapman *v.* Bluck, 5 Scott, 515; Alderman *v.* Neate, 4 M. & W. 704. But see Goodtitle *v.* Way, 1 T. R. 735; Poole *v.* Bentley, 12 East, 168; Wms. Real Prop. 327; Pinero *v.* Judson, 6 Bing. 206; Doe *v.* Ries, 8 Bing. 178; Jones *v.* Reynolds, *per* Wightman, J., 1 Q. B. 517.

[2] Whitney *v.* Allaire, 1 N. Y. 305, 311; Holley *v.* Young, 66 Me. 520; Bussman *v.* Ganster, 72 Penn. St. 285; People *v.* Kelsey, 14 Abb. Pr. 372.

[3] Aiken *v.* Smith, 21 Vt. 172; People *v.* Gillis, 24 Wend. 201; Jackson *v.* Eldridge, 3 Story, 325; Griffin *v.* Knisely, 75 Ill. 447; Buell *v.* Cook, 4 Conn. 238, where the agreement was held to be for a lease, and not a lease itself, as it showed the lessor was to get an authority from another party before he could make a valid demise. So Brown *v.* N. Y. C. R. R. 44 N. Y. 79, where the covenants were not settled. In Doe *v.* Benjamin, 9 Ad. & E. 644, "agree to let" was held equivalent to an actual present letting, though no time was fixed for commencement of the same, and the agreement contained a clause, "a lease to be drawn upon the usual terms." So Hand *v.* Hall, 2 Exch. Div. 355. See Jackson *v.* Myers, 3 Johns. 388, 395; Sturgion *v.* Painter, Noy, 128.

[4] 1 Rolle, Abr. 847. In Jackson *v.* Delacroix, 2 Wend. 433, where there were words of present demise, but the agreement showed that alterations were to be made in the estate before the lease was to take effect, it was held not to be a lease. So McGrath *v.* Boston, 103 Mass. 369, where repairs were to be done and then a lease given. But in Bacon *v.* Bowdoin, 22 Pick. 401, though the lessor was in terms to complete a building, the agreement was a present demise of it for a certain time, and the lessee was to have a right to use it for certain purposes from the date of the agreement, it was held to be a present lease. So People *v.* Kelsey, 14 Abb. Pr. 372.

ties may be looked to, to aid in the construction which is to be given to their agreements in this respect, where the agreement is equivocal, especially the yielding of possession by the one and accepting it by the other.[1] And sometimes an agreement which might, otherwise, be defective for want of stipulations as to the terms of the letting, may be made good by providing these shall be "such as are usually contained in leases."[2]

§ 621. **The Test whether a Written Instrument is a Lease or** only an agreement for a lease is sometimes stated to be, that if the agreement of the parties leaves nothing incomplete, it may operate as a present demise. Thus, "we agree to let" certain land to a gas company to place sand, etc., on, for the construction of a gas-holder, to be occupied during the construction of the same, was held to be an actual letting, by which the lessors were bound, although they never built their gas-holder upon the proposed site.[3] So where A wrote B that he would take his house at a certain rent for three years, if he would put a furnace into it, and B replied by letter that he accepted the offer and at once procured and placed a furnace in the house before the day fixed for the three years to begin, it was held to be a lease and not a mere offer to take one.[4] In another case, A proposed to B, in writing, to hire a shop of certain dimensions on a certain piece of land for a certain time, at a certain rent, if B would erect it; and B accepted the offer and erected the shop, and A went into occupation of it. But, in fact, B did not own the land and did not complete the shop within the time agreed. It was held that by accepting and entering into occupancy of the premises, the agreement became

In Chapman *v.* Towner, 6 M. & W. 100, there were words of demise in the agreement, but the amount of rent or terms of holding were not mentioned in it, except as to be contained in a lease to be prepared, it was held to be an agreement and not a lease. See 6 M. & W. 104; Am. ed., note; Morgan *v.* Bissell, 3 Taunt. 65; Jones *v.* Reynolds, 1 Q. B. 506, 515. But in Doe *v.* Benjamin, 1 Perr. & D. 444, Lord Denman declares Morgan *v.* Bissell overruled, so far as that provision for giving a future lease controls a present demise.

[1] Chapman *v.* Bluck, 5 Scott, 515, 533, per Parke, J.; s. c. 4 Bing. N. C. 187; Doe *v.* Ashburner, 5 T. R. 163.

[2] Alderman *v.* Neate, 4 M. & W. 704.

[3] Kabley *v.* Worcester Gas Co., 102 Mass. 392.

[4] Shaw *v.* Farnsworth, 108 Mass. 357.

an effectual lease for the agreed term, though A might recoup the damages he sustained by B's delay in completing the shop.[1] But in such a case, a failure of the lessor to have the building completed by the time fixed in the agreement would, if the lessee chose, release him from his obligation to accept it and pay rent.[2] And where there was an agreement, not under seal, on one part to let and on the other to hire, and that a good lease should be made at the joint expense of the parties, it was held, though not to be a lease, to be binding as an agreement to take a lease.[3]

§ 622. **The Importance of this Distinction** between agreements to lease, and agreements which operate as leases, results, among other things, from this, that as an executed written contract must speak for itself, and cannot be added to or corrected by parol, if the agreement be held to be a lease the parties will be bound by it, as written, with its *implied* as well as express covenants and stipulations; whereas, if it is a mere agreement to lease, these may be rectified or supplied before it is executed, or the party may refuse to execute it.[4]

§ 623. **A Lease may operate by Estoppel,** although the lessor, at the time of making it, has no estate in the subject-matter of the lease. Thus suppose A makes a deed of indenture of lease of premises to which he has no title, and afterwards acquires one during the term; he will not be admitted to deny that his lessee had a good title to the same, nor, on the other hand, will the lessee, if permitted to occupy under such a lease, be at liberty to deny the title of his lessor.[5] To produce the effect above stated, it has been laid down that the lease must be by *indenture*, whereby the deed becomes the act of both parties, in order that the estoppel thereby created may be mutual; [6] and

[1] Haven *v.* Wakefield, 39 Ill. 509.

[2] Tidey *v.* Mallett, 16 C. B. N. S. 298.

[3] Bond *v.* Rosling, 1 Best & S. 371.

[4] Sugden's Letters, 118.

[5] Burton, Real Prop. § 850 and n.; Smith, Land. & Ten. 32 and n.; Co. Lit. 47 *b*; Sturgeon *v.* Wingfield, 15 M. & W. 224; Utica Bk. *v.* Mersereau, 3 Barb. Ch. 528, 567; Wms. Real Prop. 329; Rawlyn's Case, 4 Rep. 53; Bac. Abr. Lease, O.; Burr *v.* Stenton, 43 N. Y. 462, 466. It was also held that the tenant would have no recourse, if evicted by a foreclosure sale, against the surplus therefrom arising. But this is qualified by Clarkson *v.* Skidmore, 46 N. Y. 297.

[6] Burton, Real Prop. § 850; Co. Lit. 352 *a*; 1 Platt, Leases, 55.

as a corollary thereto that infants and *femes covert* cannot avail themselves of the benefit of a lease where the lessor demises premises without having any estate in the same.[1] But, inasmuch as the estoppel of the tenant to deny the lessor's title flows from possession and not the form of the instrument, neither of these propositions is probably tenable at the present day.[2] So, by the American law, if one having no estate grant land by deed with covenants of warranty of title, and afterwards acquire a title to the granted premises, it will enure and pass to the grantee by estoppel.[3] But this doctrine of creating a demise of a certain extent of estate by estoppel does not apply where the lessor has any legal estate in the premises which passes by the lease, though less than that which he has, in terms, demised.[4] One pretty obvious reason for this rule would be, that to fix what the amount of estate is which actually passes by the lease, would open the very inquiry by evidence which it is the purpose and effect of an estoppel to preclude.

§ 624. **Of Parties who may be Lessors.** — In respect to who may be parties to such leases as have been mentioned above, it may be said, generally, that the same rules apply as in other cases of contract. In treating of who may be lessors, it may be stated, that the lease of a person *non compos mentis*, regarded as an executory contract, is void. But it has been held otherwise in England, in respect to an executed contract, where the parties cannot be restored *in statu quo*, especially in the case of a lunatic, if the unsoundness of mind was unknown to the other party, and no advantage was taken of

[1] 1 Platt, Leases, 55.

[2] Bigelow, Estoppel, c. 15; Taylor, Land. & Ten. (8th ed.) §§ 89, 90.

[3] Somes *v.* Skinner, 3 Pick. 52; Baxter *v.* Bradbury, 20 Me. 260; 2 Smith, Lead. Cas. (5th Am. ed.) 625; White *v.* Patten, 24 Pick. 324; Knight *v.* Thayer, 125 Mass. 25; Utica Bk. *v.* Mersereau, 3 Barb. Ch. 528, 567; Rawle, Cov. c. 9; Wms. Real Prop. 330, Rawle's note.

[4] Co. Lit. 45 *a*; Burton, Real Prop. § 850; Wms. Real Prop. 330; Blake *v.* Foster, 8 T. R. 487, 496; Doe *v.* Seaton, 2 C. M. & R. 728. See Cuthbertson *v.* Irving, 4 Hurl. & N. 742; s. c. 6 id. 135, where the old doctrine supposed to be derived from Noke *v.* Awder, Cro. El. 436, that such a lease by estoppel carries no rights to assignees which they could enforce, is limited to cases where the want of actual interest appears in the instrument of demise in the pleadings. And even this requirement is denied, except in actions of covenant or ejectment, in Morton *v.* Woods, L. R. 4 Q. B. 293, 303.

him.[1] In the United States, it would seem that it makes no difference with the parties as to the right of a person *non compos* to avoid any and all his contracts, that the party dealing with him was not apprised of his incapacity, and did not overreach him.[2] And in this respect, insane persons and infants are placed upon the same ground, substantially, as to their acts being voidable and not void, provided the insane person be not under guardianship.[3] But, in New York, the deed of a person *non compos mentis* is entirely void.[4] Leases made by infants are voidable and not void;[5] but to disaffirm an act which is voidable only, requires some positive act on their part, while, as will appear, it may be ratified by slight circumstances and in some cases even by inaction. What is necessary in order to disaffirm such act, has received different constructions at different times, and must obviously depend much upon the nature of the original act. If, for instance, an infant has made a deed of conveyance of land, inasmuch as he has parted with his seisin thereby, it has been held, and, it is believed is the better doctrine, that he can only avoid it by re-entry, unless he has retained possession, or unless it was wild and vacant land, in which case a deed of it to a

[1] Smith, Land. & Ten. 47 and note; Molton *v.* Camroux, 2 Exch. 487; s. c. 4 Exch. 17; Dane *v.* Kirkwall, 8 Car. & P. 679; Beavan *v.* M'Donnell, 9 Exch. 309.

[2] Seaver *v.* Phelps, 11 Pick. 304; Mitchell *v.* Kingman, 5 Pick. 431; Rice *v.* Peet, 15 Johns. 503; Bensell *v.* Chancellor, 5 Whart. 371 Desilver's Est., 5 Rawle, 111, where it was held that a deed of bargain and sale by a lunatic was void, though a feoffment and livery of seisin by him would only be voidable. Grant *v.* Thompson, 4 Conn. 203; Lang *v.* Whidden, 2 N. H. 435. In Fitzgerald *v.* Reed, 9 Sm. & M. 94, the court say, "The contracts of *non compotes mentis* are, if not wholly void, at all events voidable." This was a case of a purchase of land. But in some States the opposite rule prevails, and the deed of a lunatic will bind in favor of such *bona fide* purchaser for value. Riggan *v.* Green, 80 N. C. 236; Rusk *v.* Fenton, 14 Bush, 490; *post*, § 2107.

[3] Hovey *v.* Hobson, 53 Me. 451, 456; Thompson *v.* Leach, 3 Mod. 296, 310; Somers *v.* Pumphrey, 24 Ind. 231, 238.

[4] Van Deusen *v.* Sweet, 51 N. Y. 378. So in Oregon. Farley *v.* Parker, 6 Oreg. 105.

[5] Co. Lit. 308 *a*; Zouch *v.* Parsons, 3 Burr. 1806; Worcester *v.* Eaton, 13 Mass. 371, 375; Scott *v.* Buchanan, 11 Humph. 468; Kendall *v.* Lawrence, 22 Pick. 540; Roof *v.* Stafford, 7 Cow. 179; Stafford *v.* Roof, 9 Cow. 626; Roberts *v.* Wiggin, 1 N. H. 73; Tucker *v.* Moreland, 10 Pet. 58, 71; Jackson *v.* Carpenter, 11 Johns. 539; Drake *v.* Ramsay, 5 Ohio, 251; Bool *v.* Mix, 17 Wend. 119; *post*, § 2108.

stranger would be a disaffirmance of his first conveyance.[1] All the cases agree that such an entry would be sufficient and effectual. But in several it was held that a deed, without a formal prior entry to regain a seisin, would be sufficient.[2] So one who executes an agreement while so intoxicated as not to understand its meaning and effect may avoid it.[3] Leases by married women are void, unless they relate to their own sole property over which, by chancery or the statute of the State where they live, they are authorized to act as *femes sole*.[4] Leases obtained by duress are voidable, but not void.[5] So a lease may be avoided for fraud. But if the lessee be the party defrauded, he should act promptly in rescinding the contract; and so long as he retains possession of the premises, he is liable for the rent.[6] And if the grantor in a deed seeks to avoid it on the ground of fraud, he must rescind the contract, and return the consideration within a reasonable time after discovering it, or it will be too late.[7] But this does not apply to cases of an infant's conveying lands, especially if the money has been spent or wasted by him while a minor.[8]

§ 625. **Ratification and Avoidance of Voidable Leases.** — Such leases may consequently be affirmed and made effectual by ratification, or disaffirmed and avoided, by the acts and declarations of the lessor, done or made at a proper time. In the first place, the right to disaffirm a lease is a personal privilege, and must be exercised by the lessor himself or his

[1] Worcester *v.* Eaton, 13 Mass. 371; Whitney *v.* Dutch, 14 Mass. 457, 462; Roberts *v.* Wiggin, 1 N. H. 75, unless the land be wild and vacant; Murray *v.* Shanklin, 4 Dev. & B. 289; Bool *v.* Mix, 17 Wend. 133, explaining Jackson *v.* Burchin, 14 Johns. 124, and Tucker *v.* Moreland, 10 Pet. 58.

[2] Cresinger *v.* Welch, 15 Ohio, 156, 192; Scott *v.* Buchanan, 11 Humph. 468; Drake *v.* Ramsay, 5 Ohio, 251; Jackson *v.* Carpenter, 11 Johns. 539; Jackson *v.* Burchin, 14 Johns. 124, where the land was vacant; Tucker *v.* Moreland, 10 Pet. 58, the minor having been all the time in occupation of the premises.

[3] Gore *v.* Gibson, 13 M. & W. 623.

[4] Smith, Land. & Ten. 48; 1 Platt, Leases, 48; Murray *v.* Emmons, 19 N. H. 483; Prevot *v.* Lawrence, 51 N. Y. 219; Mass. Pub. Stat. c. 147, § 2; Melley *v.* Casey, 99 Mass. 241; Childs *v.* Sampson, 117 Mass. 62, were decided under a prior statute.

[5] Perkins, § 16; 1 Platt, Leases, 47; Worcester *v.* Eaton, 13 Mass. 371.

[6] McCarty *v.* Ely, 4 E. D. Smith, 375.

[7] Bassett *v.* Brown, 105 Mass. 551; Bartlett *v.* Drake, 100 Mass. 174.

[8] Walsh *v.* Young, 110 Mass. 396, 399; Chandler *v.* Simmons, 97 Mass. 508; Bartlett *v.* Drake, 100 Mass. 174.

heirs, and not by a stranger.[1] So far as a lease is to be regarded as having the properties of a deed of conveyance of land, the authorities above cited may be applicable. But, as will be seen, the law is much more liberal in allowing an infant to disaffirm the sale of a chattel than the conveyance of land, since he may do the one before arriving at age, but he cannot disaffirm his deed of conveyance while an infant.[2] It would seem by the analogy there is between the chattel interest in a term for years, in which no seisin passes, and the property in personal chattels, that a lease may be disaffirmed by an infant before arriving at age, and from the well-settled principle, that, though an infant cannot defeat his deed until he is of age, he may enter and take the profits of the land while an infant, an infant lessor may enter and avoid his lease during his infancy. However this may be held by the courts, the following authorities are, it is clear, that while an infant may not avoid his deed until after arriving at age, he may disaffirm and avoid a sale of a chattel.[3] In respect to the time within which an infant may or must disaffirm the act which he would avoid, in some cases it has been held that he may avoid his deed of lands at any time after arriving at age, within the period of limitation for making an entry.[4] In others it has been held he must do it, if at all, within a reasonable time after arriving at age, and if not done within such time it becomes irrevocable.[5] And others hold, that in regard to contracts, in order to make them binding as such, the minor must affirm them after coming of age, by some distinct act, with full knowledge that it would not be bind-

[1] 1 Platt, Leases, 32; Worcester *v.* Eaton, 13 Mass. 371; Wheaton *v.* East, 5 Yerg. 41, 61.

[2] Robson *v.* Flight, 4 De G. J. & S. 608.

[3] Zouch *v.* Parsons, 3 Burr. 1808; but he may enter and take the profits. Bool *v.* Mix, 17 Wend. 119, 132; Scott *v.* Buchanan, 11 Humph. 468, 473; Roof *v.* Stafford, 7 Cow. 179, that he can avoid neither as to personalty nor lands until of age. But overruled as to personalty, and affirmed as to lands. Stafford *v.* Roof, 9 Cow. 626; Shipman *v.* Horton, 17 Conn. 481; Matthewson *v.* Johnson, 1 Hoff. Ch. 560, though an infant may not avoid his deed till of age, he may enter and take the profits of the land.

[4] Drake *v.* Ramsay, 5 Ohio, 251; Cresinger *v.* Welch, 15 Ohio, 156, 193.

[5] Richardson *v.* Boright, 9 Vt. 368; Holmes *v.* Blogg, 8 Taunt. 35; Kline *v.* Beebe, 6 Conn. 494; Scott *v.* Buchanan, 11 Humph. 468; 2 Kent, Com. 238; Hoit *v.* Underhill, 9 N. H. 436; Keil *v.* Healey, 84 Ill. 104.

ing without such confirmation.[1] Slight circumstances often amount to a confirmation by a minor after coming of age, as, in the cases above cited, a mere omission to do any act of disaffirmance within a reasonable time. In Wheaton *v.* East, the infant vendor, after coming of age, saw his vendee making expensive improvements on the land, and said he had been paid and was satisfied, and it was held a confirmation, though this was within two years after his majority.[2] In Houser *v.* Reynolds, the vendor, after coming of age, said he never would take advantage of his having been an infant when he made the deed, and told the grantee it was his wish he should keep the deed.[3] And the receipt of rent upon a lease after arriving at age, would of itself affirm the lease.[4]

§ 626. **Husband's Lease of Wife's Land.** — As by common law the husband is entitled to the rents and profits of his wife's lands, a lease by him of these was good during coverture, though she did not join in the same;[5] and if she joined in the lease, the covenant as to payment of rent enured to his benefit alone, and might be declared on accordingly.[6] But his lease was only good during coverture, and on his decease his wife can avoid it;[7] but her acceptance of rent would affirm it.[8]

§ 627. **Leases by Guardians.** — The guardian of a minor may lease his lands.[9] But this is limited by the term of his

[1] Curtin *v.* Patton, 11 S. & R. 305; Thompson *v.* Lay, 4 Pick. 48; 2 Kent, Com. (8th ed.) 239, n.; Hoyle *v.* Stowe, 2 Dev. & B. 320. So of a deed. Tucker *v.* Moreland, 10 Pet. 58, 76; Gillespie *v.* Bailey, 12 W. Va. 70.

[2] Wheaton *v.* East, 5 Yerg. 41, 62. So Davis *v.* Dudley, 70 Me. 236, where the improvements were made during the minority. See Wallace *v.* Lewis, 4 Harringt. 75.

[3] Houser *v.* Reynolds, 1 Hayw. 143.

[4] Smith, Land. & Ten. 48. See also Cheshire *v.* Barrett, 4 McCord, 241; Smith *v.* Low, 1 Atk. 489. And see *post*, § 2109.

[5] 1 Platt, Leases, 138; Burton, Real Prop. § 895; Smith, Land. & Ten. 41; Wms. Real Prop. 336. She may lease. Sullivan *v.* Barry, 46 N. J. L. 1.

[6] Arnold *v.* Revoult, 1 Brod. & B. 443; Wallis *v.* Harrison, 5 M. & W. 142; Bret *v.* Cumberland, Cro. Jac. 399.

[7] Winstell *v.* Hehl, 6 Bush, 58.

[8] Trout *v.* McDonald, 83 Penn. St. 144.

[9] 2 Kent, Com. 228; King *v.* Oakley, 10 East, 491, 494; but in Massachusetts a guardian must do this in the ward's name, Hicks *v.* Chapman, 10 Allen, 463; and if he make it in his own, he only binds himself, Mansur *v.* Pratt, 101 Mass. 60.

office, and a demise for a longer period than the minority of his ward would be void as to the excess at the election of the ward.[1] Thus, in New York, it was held, that while a guardian might lease his ward's lands for a term as long as he continues guardian, or for any number of years within the minority of his ward, it is subject to be defeated by the appointment of a new guardian; and a similar principle is recognized in Illinois.[2] The same rule applies to guardians of insane persons. The lease would determine upon the death of the ward, whatever its terms may have been. But whether it would bind the *lessee* for the original term, if the heirs of the ward chose to affirm the lease, seems to be left unsettled.[3] But a parent is not such a guardian as to have a right to lease or deal with the lands of his minor child.[4]

§ 628. **Leases by Executors and Administrators.** — Executors and administrators, as having the property in a term for years, may dispose of the whole or carve out a less estate by under-lease.[5] Nor can an executor or administrator of a lessee disclaim the leasehold interest of the deceased.[6] And in the case of two or more executors, a lease or transfer of a term by one, if purporting to be of the entire interest, will pass it.[7]

§ 629. **Leases by Trustees and Corporations.** — Trustees who have the legal fee in lands may lease them to any extent, the right being incident to the legal estate.[8] Corporations have a power to lease their lands, as incident to the power to hold them, and this they may do either with or without a seal.[9]

[1] 1 Platt, Leases, 330; Bacon, Abr. Lease, I. 9; Smith, Land. & Ten. 46. The acceptance of rent by the minor, after coming of age, would affirm such lease, and make it valid. Ross *v.* Gill, 4 Call, 250; Van Doren *v.* Everitt, 5 N. J. 460. It is, however, the duty of the guardian to lease. Hughes Minors App., 53 Penn. St. 500.

[2] Emerson *v.* Spicer, 46 N. Y. 594; Webster *v.* Conley, 46 Ill. 13.

[3] Campau *v.* Shaw, 15 Mich. 226, 232.

[4] Smith, Land. & Ten. 46, n.; May *v.* Calder, 2 Mass. 55; Anderson *v.* Darby, 1 Nott & M. 369; Magruder *v.* Peter, 4 Gill & J. 323.

[5] Bacon, Abr. Lease, I. 7; 1 Platt, Leases, 366.

[6] Burton, Real Prop. § 972.

[7] Wms. Ex'rs, 778; id. 810, n., Am. ed.; Doe *v.* Sturges, 7 Taunt. 217. See also George *v.* Baker, 3 Allen, 326, note.

[8] Hill, Trust. 482.

[9] Ang. & Ames, Corp. § 220; 2 Kent, Com. 233.

§ 630. **Leases under Powers of Appointment.** — While every one who has an interest in lands in possession, may, at common law, transfer the same, and only such may lease lands, it is competent, under the statute of uses, to convey lands, so that the seisin shall be in one, with an authority in another to create a leasehold interest in a third person, by appointing or declaring who this third person or lessee shall be. The authority to do this is called a power, the exercise of which has the same effect in creating a lease in the lessee, as if he who has the power had an interest in the land as well as the power, although he has none. Of this character are the powers ordinarily inserted in marriage settlements, whereby tenants for life are authorized to create leases which shall extend beyond the period of such tenant's own estate.[1] The person named or appointed derives his estate from and under the original deed conveying the seisin, the donee of the power being the medium only, through which it is ascertained in whose favor the lease shall take effect.[2]

§ 631. **Lease by Unauthorized Agent.** — Where one without authority acts in the name of another in leasing his lands, and the lessee enters upon and occupies the same under the lease, if the one named as principal sees fit to avail himself of the lease, the lessee will be estopped to deny that the agent acted with authority,[3] nor could he deny such agency against an assignee of lessor who should sue thereon for the rent.[4]

§ 632. **Leases by Tenants in Common.** — From the nature of the estates of tenants in common, their seisins being separate and distinct though their possession is one, each must demise his own share distinct from the other, though the covenants in the leases in which they join in demising their common land may be so framed as to become joint. But, unless expressly made so, they will be construed to be separate according to their respective interests.[5] But no tenant in common

[1] *Post*, § 1659.

[2] Smith, Land. & Ten. 43, 44; Wms. Real Prop. 254, Rawle's ed., n.; 2 Crabb, Real Prop. 769; Maundrell *v.* Maundrell, 10 Ves. 256; *post*, § 1660.

[3] McClain *v.* Doe, 5 Ind. 237.

[4] Kendall *v.* Carland, 5 Cush. 74.

[5] Mantle *v.* Wellington, Cro. Jac. 166; Heatherly *v.* Weston, 2 Wils. 232; 1 Platt, Leases, 131; Beer *v.* Beer, 12 C. B. 60, 80; Smith, Land. & Ten. 49, n.

can make a lease of a part in severalty valid as against his co-tenants.[1] If the letting be a joint one, and one lessor dies, the survivor may recover the entire rent reserved.[2]

§ 633. **Partnership Leases.** — But one of two partners cannot lease partnership property so as to bind his copartner.[3] And where one of several partners let his estate to the company, to be used in the business of the firm, and the partnership was dissolved by the death of one of its members, the lease was held to be thereby, *ipso facto*, determined. But it would be otherwise if the lease was from a third person.[4] Thus, where one leased premises to a partnership for three years with a covenant to renew the lease for two years if lessees gave notice during the three years, and one of the partners died during that term, and the survivor gave notice of his wish to renew the lease, it was held, that, as survivor, he had a right to insist upon the renewal. It was not the assumption of a new debt, which a surviving partner has no right to make.[5] A lease made by one partner in the company name was held to be binding upon both where the other partner attested the lease.[6]

§ 634. **Who may be Lessees.** — In general terms, any one may be made a lessee, although not every one may be capable of entering into covenants as a lessee. Thus lunatics and drunkards may be made lessees, because, *prima facie*, it is a beneficial act for them.[7] So a *feme covert* may be made a lessee.[8] And an infant may not only be a lessee, but, if the hiring may be considered in law as necessary, he will be bound to pay rent;[9] and if he continues to retain the leased premises after coming of age, beyond a reasonable time in

[1] Austin *v.* Ahearne, 61 N. Y. 6; Cunningham *v.* Pattee, 99 Mass. 248; Tainter *v.* Cole, 120 Mass. 162.

[2] Codman *v.* Hall, 9 Allen, 335.

[3] Dillon *v.* Brown, 11 Gray, 179.

[4] Johnson *v.* Hatshorn, 52 N. Y. 173.

[5] Betts *v.* June, 51 N. Y. 274, 279; and see Eaton's Appeal, 66 Penn. St. 483.

[6] Bussman *v.* Ganster, 72 Penn. St. 285, 289.

[7] Co. Lit. 2 *b*; 1 Platt, Leases, 530.

[8] 1 Platt, Leases, 531; Co. Lit. 3 *a*; but she may, when discovert, disavow and defeat the lease, nor does this apply to married women whose husbands have abjured the realm.

[9] Lowe *v.* Griffith, 1 Scott, 458; Smith, Land. & Ten. 54.

which to disaffirm it, he will thereby affirm the lease and render it binding.[1]

§ 635. **What may be leased.** — Strictly speaking, only corporeal property can be leased. Contracts respecting incorporeal hereditaments may be good as contracts, they do not create the relation of landlord and tenant as ordinarily understood.[2] There are, however, many contracts in relation to interests in lands, which acquire more or less of the character of leases of real estate, especially in the matter of covenants, although the interests are incorporeal, as a right of wharfage,[3] a right of flowage of lessor's lands, and the like,[4] where many of the rules adapted to leases of corporeal hereditaments are applied. It has accordingly been held that a lease by a widow of her right of dower, before the same has been set out to her, is invalid.[5]

§ 636. **When Terms for Years made Freeholds.** — Though, as has been already stated, a term for years, when created, is but a chattel interest in lands, however long may be its duration,[6] in some of the States long terms have, by statute, the properties of freehold estates of inheritance. Thus, for instance, in Massachusetts, if the original term be for a hundred or more years, it is deemed a fee so long as fifty years remain unexpired. So in Ohio, perpetual leases, or those renewable forever, though in law estates for years only, are by statute regarded as real estate, so far as judgments and executions are concerned. So also as to descent and distribution, they are regarded as freehold estates.[7]

§ 637. **Terms attendant upon the Inheritance.** — These were

[1] Holmes *v.* Blogg, 8 Taunt. 35, where holding four months after age was held to be an affirmance of the lease. Ketsey's Case, Cro. Jac. 320; Doe *v.* Smith, 2 T. R. 436, holding that disaffirmance within a week or fortnight would be reasonable.

[2] Smith, Land. & Ten. 58.

[3] Mayor *v.* Mabie, 3 N. Y. 151; Smith *v.* Simons, 1 Root, 318; Wallace *v.* Headley, 23 Penn. St. 106, where the demise was of the lands which might be flowed by a dam of certain dimensions.

[4] Provost *v.* Calder, 2 Wend. 517, case of a lease of a stream of water, and privilege of erecting a dam, etc.

[5] Croade *v.* Ingraham, 13 Pick. 33.

[6] 1 Platt, Leases, 3.

[7] Walker, Am. Law, 279; Northern Bank of Kentucky *v.* Roosa, 13 Ohio, 334.

long leases created by way of trust to secure jointures, and raise portions, or money on mortgage for family purposes; but the learning applicable to them is now useless in the United States. The student desiring to follow up the subject is referred to 4 Kent's Commentaries, *86 *et seq.*

§ 638. **Chattel Character of Terms.** — With the exceptions created by statute, estates for years have the properties of chattel interests, however long they may be to endure, such as merging in the freehold, descending to personal representatives instead of heirs, not being subject to dower, passing by a will, and being liable to be sold as personal property, and the like.[1]

§ 639. **Necessity for recording Leases.** — But to guard against fraud upon purchasers in buying lands subject to leases, many of the States require them to be registered, to be effectual against subsequent purchasers without notice or creditors, if they exceed a prescribed length of time. This in Massachusetts is seven years,[2] in Kentucky five,[3] New Hampshire seven,[4] Delaware twenty-one years, if for a fair rent accompanied by possession.[5] But these citations are given rather by way of illustration than as a full statement of the several laws on the subject.

§ 640. **Leases under Statute of Uses.** — If the language and consideration expressed in a lease are sufficient to raise a *use*, the statute of uses comes in and annexes the possession to the use, for most purposes, without an actual entry by the lessee.[6]

§ 641. **Effect of Possession by Lessor or Lessee.** — And as soon as the lessee shall have entered under a written lease,

[1] *Ex parte* Gay, 5 Mass. 419; Chapman *v.* Gray, 15 Mass. 445; Spangler *v.* Stanler, 1 Md. Ch. Dec. 36; Brewster *v.* Hill, 1 N. H. 350; Murdock *v.* Ratcliff, 7 Ohio, 119; Bisbee *v.* Hall, 3 Ohio, 449; Dillingham *v.* Jenkins, 7 Sm. & M. 479. The constitution of New York has abolished all long leases of agricultural land, limiting them to twelve years. 4 Kent, Com. 93 (8th ed.), note. It is usual in a lease to demise to the lessee, "his executors and administrators," but such words of limitation are unnecessary. Burton, Real Prop. § 849.

[2] Pub. Stat. c. 120, § 4; Chapman *v.* Gray, 15 Mass. 439. Must not exceed seven years from making of the lease.

[3] Locke *v.* Coleman, 4 Mon. 315.

[4] Brewster *v.* Hill, 1 N. H. 350.

[5] Thornton, Conv. 125.

[6] 4 Kent, Com. 97; 1 Cruise, Dig. 249; 2 Sand. Uses, 56; *ante*, § 613.

the lessor is so effectually divested of the possession that he cannot maintain trespass against a stranger who should enter and cut trees upon the premises, although the tenant himself is restricted from cutting them,[1] though, had he excepted them in his lease, he might have maintained trespass for cutting them.[2] In the former case, the tenant might have trespass for the cutting of the trees, if done by a stranger, and the owner of the inheritance trover for the value of them.[3] But the lessor would have no right to enter upon the premises, although the lessee should have actually left and abandoned possession of the same.[4] Questions similar to those respecting trees have arisen in relation to minerals in the earth, where the soil has been leased, and no reserve of these has been made. If no mine had been opened within the premises, the lessee had no right to work the minerals, and had he done so he would be liable in waste, but not in trespass; whereas, had another entered and worked these, or dug any of them, though without breaking the surface, the tenant might have trespass against him. So if, in the case supposed, a lease were made of the minerals to the tenant of the surface and another, the possession of the tenant would enure to both lessees of the minerals and create an actual estate and not a mere *interesse termini* therein, and they might work the mines.[5] The general rights of lessees of lands, in which there are minerals, are these: If there is an open mine on the premises, they may work it. But they may not open a new one, unless a right to do so is expressly granted. And if the land and mines under it are described as the subjects of the lease, and there be no open mine, the lessee may open one and work it.[6]

§ 642. **Liability of Lessee before Entry.** — So far as liability upon his covenants is concerned, debt or covenant will lie against a lessee who has accepted a lease, notwithstanding he

[1] Greber *v.* Kleckner, 2 Penn. St. 289.

[2] Schermerhorn *v.* Buell, 4 Denio, 422; Reynolds *v.* Williams, 1 Texas, 311; Van Rensselaer *v.* Van Rensselaer, 9 Johns. 377.

[3] Burnet *v.* Thompson, 6 Jones (N. C.), 210, 213.

[4] Shannon *v.* Burr, 1 Hilton, 39.

[5] Keyse *v.* Powell, 2 Ellis & B. 132; Lewis *v.* Branthwaite, 2 B. & Ad. 437.

[6] Clegg *v.* Rowland, L. R. 2 Eq. 160; Co. Lit. 54 *b*.

may not have entered. The privity of contract between lessor and lessee is complete without entry,[1] while the privity of estate depends upon the entry having been made.[2] And though a lessee, by assigning his interest, destroys this privity of estate, he still remains liable on his contract.

§ 643. **Lease must be accepted to bind.** — In all these cases, in order to charge a party, under an instrument, as being bound by it, it is essential to show his acceptance of it,[3] though, where it is obviously for his benefit, such an acceptance will often be presumed.[4] And his acceptance may often be inferred from his acts. As where, by the terms of his lease for three years, the tenant had a right to hold for two more, but at an enhanced rent, and he continued to hold after the expiration of the three years, and paid the enhanced rent for one or two quarters, it was held to be such an election as bound him for the whole term.[5] And it may be stated in this connection, that a lease of premises hired for unlawful purposes, such, for instance, as those of prostitution, where the lessor, knowing this, aids the lessee in any way in accomplishing his purpose, would be void. But the mere knowledge on the part of the lessor that the premises are intended to be used for such purposes, unless he participates in the design, does not render the lease void. If the house is so used by the tenant, the lessor may enter and oust him.[6]

1 Salmon *v.* Smith, 1 Saund 203, n. 1; Bellasis *v.* Burbrick, 1 Salk. 209.

2 Eaton *v.* Jaques, Doug. 455–461. The point decided was, that a mortgagee of a term would not be liable upon the covenants in the lease creating it, until entry made. 4 Kent, Com. 175. Com. Land. & Ten. 271, however, lays it down unqualifiedly, "Immediately upon the assignment being made, the assignee becomes liable even before his entry upon the premises." See, accordingly, Williams *v.* Bosanquet, 1 Brod. & B. 238. The subject is further examined *post*, § 707.

3 Jackson *v.* Richards, 6 Cow. 617; Sheppard, Touch. (1st Am. ed.) 57; Jackson *v.* Dunlap, 1 Johns. Cas. 114; Maynard *v.* Maynard, 10 Mass. 456; Hedge *v.* Drew, 12 Pick. 141; Hatch *v.* Hatch, 9 Mass. 307. But lessees will be bound by the terms of an indenture, not executed by them so as to bind them, if they enter and occupy under it; though their liability will be in assumpsit. Carroll *v.* St. John's Soc., 125 Mass. 565; Clark *v.* Gordon, 121 Mass. 330; Lamson Co. *v.* Russell, 112 Mass. 387.

4 Jackson *v.* Bodle, 20 Johns. 184.

5 Kramer *v.* Cook, 7 Gray, 550; and see Dix *v.* Atkins, 130 Mass. 171.

6 Updike *v.* Campbell, 4 E. D. Smith, 570; O'Brien *v.* Brietenbach, 1 Hilton, 304; Ralston *v.* Boody, 20 Ga. 449; Commonwealth *v.* Harrington, 3 Pick. 26.

§ 644. **Relation of Landlord and Tenant.** — The parties having made their contract of lease, and the tenant having entered, the relation of landlord and tenant begins.[1] The lessor and lessee thereby become bound to one another in respect of *covenants in law*, and the duties prescribed in law, as incident to that relation by reason of a privity of estate. In respect to *covenants in deed*, they are bound by a privity of contract, and the *privity of estate* exists no longer than the relation of landlord and tenant continues.[2]

§ 645. **There is a Tenure between Lessor and Lessee** for years, to which fealty is incident, by theory of law, as well as a privity of estate between them.[3]

§ 646. **Nature of Tenure between Lessor and Lessee.** — Such relation implies a tenancy limited in point of time, and not so extensive in duration as to render the landlord's interest practically worthless, and accompanied by some remunerative incidents to the reversion, such as rent, or something which is a substitute for it, as well as certain obligations which have already been referred to.[4] But this relation of landlord and tenant does not embrace that between sovereign and subject, nor between a reversioner and him who enjoys the particular estate on which the reversion depends, where no rent is reserved, although a kind of tenancy subsists between them.[5] Nor does it exist between mortgagor and mortgagee,[6] or vendor and vendee in possession,[7] or licenser and licensee, since a license may always be revoked so far as it extends to the occupation of the licenser's land.[8] If there is a sealed lease between the parties, and rent is due under it, the lessor cannot recover this rent in assumpsit for use and occupation, the principle in such case being, that *expressum facit cessare*

[1] Smith, Land. & Ten. 3.

[2] Com. Land. & Ten. 275; 1 Cruise, Dig. 223.

[3] Lit. § 132; Lausman *v.* Drahos, 10 Neb. 172; Thrall *v.* Omaha Co., 5 Neb. 295.

[4] Smith, Land. & Ten. 4.

[5] Smith, Land. & Ten. 3.

[6] Coote, Mortg. 332, 372.

[7] Redden *v.* Barker, 4 Harringt. 179; Dolittle *v.* Eddy, 7 Barb. 74; Watkins *v.* Holman, 16 Pet. 25, 54; Jackson *v.* Miller, 7 Cow. 747; Stone *v.* Sprague, 20 Barb. 509.

[8] Dolittle *v.* Eddy, 7 Barb. 74; Stone *v.* Sprague, 20 Barb. 509.

tacitum.[1] So that neither the court of equity nor a court of law could aid a party in such a case to any greater extent than is provided for in the lease.[2]

[1] Gibson *v.* Kirk, 1 Q. B. 850; Kiersted *v.* Orange & A. R. R., 69 N. Y. 343. And before the statute of 11 Geo. II. c. 19, § 14, which is generally adopted in the United States, a written lease precluded this action. Taylor, Land. & Ten. (8th ed.) § 635.

[2] Sheets *v.* Selden, 7 Wall. 416, 424.

CHAPTER XXI.

ESTATES FOR YEARS — OF CONDITIONS IN LEASES.

§ 647. Definition.
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§ 647. **Definition.** — A condition, in the words of Blackstone, is "a clause of contingency on the happening of which the estate granted may be defeated."[1] It is not necessary, in order that a lessor may avail himself of a condition in defeating an estate, that such breach was the cause of damage to him.[2] The word "condition" does not, necessarily, imply a condition under seal.[3]

§ 648. **Conditions in Leases favored.** — Such conditions as are annexed to estates for years, are, as a general thing, less disfavored by the law than those which tend to defeat a freehold estate; as, for instance, a grant to one of a fee, with a condition that he should not alien his estate to any one, would

[1] 2 Bl. Com. 299.
[2] Whitwell *v.* Harris, 106 Mass. 523.
[3] Hayne *v.* Cummings, 16 C. B. N. S. 420.

be void, though such a condition annexed to the estate of a lessee for years is undoubtedly good.[1] So a stipulation in a lease is a valid one, that the crops shall be the lessor's until the rent is paid, binding not only the parties to the contract, but third parties also.[2] But the words of reservation in a lease of "yielding" and "paying" may attach a condition to a fee.[3] And in this way it is often a means of securing the performance of stipulations in a lease, to make such performance a condition for the breach of which the lessor may enter and defeat the lessee's estate, or, as is sometimes the case, the lease is to cease and become void,[4] which means, however, at the option of the landlord.[5] But where there is a covenant in a lease to pay rent on certain days, and a condition that if the same was unpaid the lessor might enter and hold possession till the arrears of rent were paid, it was held to be no bar to an action upon the covenant to pay the rent as soon as the same was in arrear. Nor would an agreement in the lease to refer all questions in dispute between the lessor and lessee to arbitration be a bar to a suit upon a covenant in the lease, although the covenantor has not offered to submit the question to arbitration.[6]

§ 649. **Effect of License to violate Condition.** — If such a condition were, for instance, not to do some particular act by the lessee, such as aliening his term without lessor's assent, and the latter were to give an express license to the lessee to do this, the right to enforce it as to any subsequent breach would be gone forever. On this point Dumpor's Case is the leading authority, and is based upon the notion that every condition of re-entry, which is the appropriate mode by which the breach of condition in a deed or lease is made to be available, is an entire and indivisible thing, and, having been once waived, cannot be enforced again.[7] And so far has this been carried,

[1] Burton, Real Prop. § 852; Chickeley's Case, Dyer, 79.

[2] Cooper *v.* Cole, 38 Vt. 185, 191; Smith *v.* Atkins, 18 Vt. 461.

[3] Van Rensselaer *v.* Smith, 27 Barb. 104; Van Rensselaer *v.* Ball, 19 N. Y. 100.

[4] Wms. Real Prop. 332; Smith, Land. & Ten. 108.

[5] Smith, Land. & Ten. 112; Jones *v.* Carter 15 M. & W. 718; Clark *v.* Jones, 1 Denio, 516.

[6] Rowe *v.* Williams, 97 Mass. 163.

[7] Dumpor's Case, 4 Rep. 119; Cartwright *v.* Gardner, 5 Cush. 273, 281; Wms.

that, where the original lessee had again come into possession of the estate by mesne assignments, he took the term discharged of the condition.[1]

§ 650. **Effect of waiving Condition.** — But a mere waiver by acquiescence without any actual license, as, for instance, by taking rent of an assignee where the original tenant had been restrained from assigning by a condition in his lease, though it would ratify such assignment, would not extend to future breaches of the same kind, so as to prevent the lessor's entering and defeating the demise for a new assignment made.[2] If a breach of the condition not to underlet has been committed, and the lessor, with a knowledge of its having been done, accept rent after such subletting, it would be a waiver of forfeiture for that act of underletting, but not of any subsequent breaches by a new underletting.[3]

§ 651. **Conditions against Assignment and Underletting.** — Nor

Note. — Dumpor's Case has always been, it is believed, a stumbling-block in the way of the profession; and a writer of much discrimination, in an article in 7 Am. Law Rev. 616-640, assumes that the case "was originally without foundation in the law of conditions," "was without subsequent confirmation by decision, until" Brummel *v.* Macpherson, 14 Ves. 173; that "it had no greater claim to be recognized at that time as settled law than any other venerable error;" that "since that recognition it has, with hardly an exception, been confirmed by no decision," and has been, with almost entire uniformity, disapproved of in regard to the doctrine it propounds, and that "the idea on which it was actually founded has been entirely controverted by modern decisions." The reader is referred to the article for the grounds upon which the writer attempts to sustain these positions. See also Wms. Real Prop. *273. Fortunately the case is of rare application, and in England the difficulty is cured by the statute 22 & 23 Viet. c. 35, §§ 1, 2, and 3, by which a license to do anything which would be otherwise a breach of a condition or covenant in a lease will extend only to the specific act licensed to be done.

Real Prop. 332; 1 Smith, Lead. Cas. (5th Am. ed.) 85; Burton, Real Prop. § 853; Doe *v.* Bliss, 4 Taunt. 735; Dickey *v.* McCullough, 2 Watts & S. 88; Bleecker *v.* Smith, 13 Wend. 530; Smith, Land. & Ten. 117; Chipman *v.* Emerie, 5 Cal. 49; McKildoe *v.* Darracott, 13 Gratt. 278; Murray *v.* Harway, 56 N. Y. 337, 343; Gannett *v.* Albree, 103 Mass. 372; Pennock *v.* Lyons, 118 Mass. 92; Dougherty *v.* Matthews, 35 Mo. 520; Porter *v.* Merrill, 124 Mass. 534.

[1] Doe *v.* Smith, 5 Taunt, 795.

[2] Burton, Real Prop. § 853; Doe *v.* Bliss, 4 Taunt. 735; Lloyd *v.* Crispe, 5 Taunt. 249. See 7 Am. Law Rev. 633.

[3] Ireland *v.* Nichols, 46 N. Y. 413; Smith *v.* Edgewood Casino Club, 19 R. I. 623; s. c. 35 Atl. Rep. 884.

would a condition not to alien be broken, so as to work a forfeiture of the estate, where it is done *in invitum*, as by a decree in bankruptcy, unless, as may be done, there is an express condition that such an act of assignment shall form the ground of forfeiture.[1] The term "assignee" is very comprehensive, and extends to all persons taking the estate in the lease either by the act of the party or of law.[2] A covenant and condition in a lease may be so framed that neither the lessee nor his executors or administrators can assign the term. But to have the effect to restrict an assignment by executors, it must be in express terms, otherwise, upon the death of the lessee, his estate passes to his executor, as coming into the place of the lessee. In the language of the court, it is "an alienation by the act of God;" and it was held to be clear law that the executors of such lessee may dispose of the term, unless they are clearly restricted by the terms of the lease.[3] Of the same character is an assignment by process of insolvency against the lessee. Such assignment not only passes the estate, but passes it discharged of the covenant not to assign, if the proceedings were *bona fide* and not colorable.[4] Nor is it a breach that one member of a partnership, to whom the premises are let with a condition not to alien or assign, goes out of the company, and another comes in and takes his place as copartner.[5] And courts are strict in construing both covenants and conditions which work a forfeiture. Thus a condition not to let or underlet on the part of the lessee is not deemed to be broken by an assignment of the entire term.[6] But the cases seem to agree that a covenant or condition not to assign is not broken by underletting the premises. A covenant not to assign is not broken by an underletting,

[1] Burton, Real Prop. § 854; Lear *v.* Leggett, 1 Russ. & M. 690; Doe *v.* Carter, 8 T. R. 57; Jackson *v.* Corliss, 7 Johns. 531; Smith *v.* Putnam, 3 Pick. 221; Yarnold *v.* Moorehouse, 1 Russ. & M. 364; 1 Smith, Lead. Cas. (1st Am. ed.) 66. And a release to a railway company of land taken by them by eminent domain was held no breach of this covenant. Baily *v.* De Crespigny, 10 Best & S. 1.

[2] 2 Platt, Leases, 410; Becker *v.* Werner, 98 Penn. St. 555.

[3] Comyns, Land & Ten. 238; Seers *v.* Hind, 1 Ves. Jr. 295; Platt, Leases, 265, 266; Taylor, Land. & Ten. § 408.

[4] Bemis *v.* Wilder, 100 Mass. 446; Doe *v.* Bevan, 3 Maule & S. 353.

[5] Roosevelt *v.* Hopkins, 33 N. Y. 81; Hargrave *v.* King, 5 Ired. Eq. 430.

[6] Lynde *v.* Hough, 27 Barb. 415; Field *v.* Mills, 38 N. J. L. 254.

unless the underletting be for the entire term; if it be, it will be regarded as an assignment.[1] If one would restrain his lessee from assigning or underletting, he must insert words to that effect in the lease.[2]

§ 652. **Who may take Advantage of Condition Broken.** — A condition can only be taken advantage of, if broken, by the lessor or his assigns; and where a tenant, holding under assignment of a lease containing a condition not to underlet or assign, let a part of the premises to a third party, it was held that he could not set up against his lessee, that the lease under which he held was void. The original landlord or his assigns were the only persons who could terminate the estate by an entry for a breach of the condition.[3] The right to enter in order to enforce a forfeiture for a breach of a condition must be reserved to the party to the lease, who is the legal owner of the reversion, and not to a stranger.[4] And if the estate of the tenant be one for life, the reversioner can only defeat it by entry.[5] But if it be for years, no entry is necessary;[6] unless it is stipulated in the lease that the lessor shall re-enter,[7] and, in this case he may, after breach, bring ejectment, without first making a formal entry.[8] Even though the lease, by its terms, is to be void if the condition is broken by the lessee, this is only at the election of the lessor.[9] The lessee could not set up in defence a breach of his own covenant not to assign, if the lessor does not object to such assignment.[10] Conditions restraining the underletting or

[1] Hargrave *v.* King, 5 Ired. Eq. 430; Beardman *v.* Wilson, L. R. 4 C. B. 57; Parmenter *v.* Webber, 8 Taunt. 593.

[2] Den *v.* Post, 25 N. J. 285; Crusoe *v.* Bugby, 3 Wils. 234. See 1 Smith, Lead. Cas. 20, 21; Roe *v.* Sales, 1 Maule & S. 297.

[3] Shumway *v.* Collins, 6 Gray, 227, 230.

[4] Sanders *v.* Merryweather, 3 Hurlst. & C. 902, 909; Morton *v.* Woods, L. R. 4 Q. B. 293, 303; 18 Am. L. Reg. 525; Taylor, Land. & Ten. § 293; 2 Platt, Leases, 318.

[5] Com. Land. & Ten. 327.

[6] Roberts *v.* Davey, 4 B. & Ad. 664; Hughes *v.* Palmer, 19 C. B. N. S. 391, 405.

[7] Shattuck *v.* Lovejoy, 8 Gray, 204; Garnhart *v.* Finney, 40 Mo. 449; Doe *v.* Birch, 1 M. & W. 402; *post*, § 662.

[8] Com. Land. & Ten. 327.

[9] Jones *v.* Carter, 15 M. & W. 718; Clark *v.* Jones, 1 Denio, 516; Shumway *v.* Collins, 6 Gray, 227; 2 Platt, Leases, 328; Taylor, Land. & Ten. §§ 238, 492; Blyth *v.* Dennett, 13 C. B. 178, 180; Bowman *v* Foot, 29 Conn. 331; *post*, § 664.

[10] Bemis *v.* Wilder, 100 Mass. 446. Webster *v.* Nichols, 104 Ill. 110.

assignment of the premises, without the lessor's assent, are intended solely for the benefit of the lessor.[1] And this doctrine was applied under the statute of Massachusetts, declaring all leases forfeited if the premises are used for illegal purposes. It constitutes a condition subsequent, of which the lessor may avail himself or not at his election. It is, moreover, a personal right, which a purchaser from the lessor cannot take advantage of in respect to any breaches arising before he becomes owner.[2] The insertion of a condition in a lease, moreover, is the only by-way of defeating the same for a breach of covenant therein, unless such breach can be construed into a determination of a conditional limitation, by which the lease is to continue *while* or *so long as* the lessee keeps his covenant, and the like.[3] Where one made a lease for three years, and two more if he did not sell the estate, in which case the lease for two years was to be void, it would make no difference as to the effect of such sale whether made before the two years begin, or, during that time, it avoided the provision as to a continuance for two years.[4]

§ 653. **Rights of Assignees.** — As the law stood before the 32 Hen. VIII. no one could avail himself of the benefit of a condition to defeat an estate by entry, except the lessor or his heirs, because such right was not assignable at common law, more than any other chose in action. The consequence was, if a lessor conveyed his reversion, although the estate would pass, and the assignee of the reversion might recover rent from the tenant in an action of debt, no covenant, as such, passed to the grantee or assignee of such reversion. And though, for breach of such covenant, the assignee might have sued in the name of the covenantee, the lessor, yet the lessor, as he had parted with all his estate, could not enter and defeat the estate of the lessee for a breach of the condition. The effect of this was, that when the Crown, in the time of Henry VIII., undertook to convey the lands of the dissolved monasteries, the grantees found themselves unable to enforce

[1] Way *v.* Reed, 6 Allen, 364.

[2] Trask *v.* Wheeler, 7 Allen, 109.

[3] Taylor, Land. & Ten. § 291 ; 7 Am. Law Rev. 256 ; Elliott *v.* Stone, 1 Gray, 571 ; Com. Land. & Ten. 104 ; Ashley *v.* Warner, 11 Gray, 43.

[4] Knowles *v.* Hull, 97 Mass. 206. So Morton *v.* Weir, 70 N. Y. 247.

the covenants and conditions under which the tenants held these lands. And to provide a remedy for the Crown, and partly for the people at large, a statute was passed,[1] by which, omitting the provisions as to the Crown lands, grantees or assignees to or by any person and their heirs, executors, administrators, and *assigns*, should "have like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste or other forfeiture, and by action only for not performing other conditions, covenants, or agreements expressed in the indentures of leases, etc., against the said lessees, etc., their executors, administrators, and assigns, as the said lessors and grantors, their heirs or successors, might have had." And a corresponding authority is given to lessees and their assigns to enforce covenants in their favor.[2] And an assignee of an undivided share may maintain an action for a breach in respect of that share.[3] But a condition, if entire, is not apportionable by the act of the parties, and will be wholly destroyed by a severance of any part of the reversion by their act.[4] It has accordingly been held, that if a lease is made reserving rent, and with condition of re-entry for non-payment, and the lessor demise the reversion for a term of years, it would carry with it the benefit of the condition, under the statute of 32 Hen. VIII. But if he lease three acres, and then grant the reversion in two of these, it does not pass the benefit of the condition, because the condition is entire and indivisible, although the rent in such case will be apportioned.[5] The effect is that one of several heirs of a reversioner may avail himself of the benefit of the condition contained in the lease, and recover in ejectment his share for the breach of the same.[6] Yet the assignee of the rever-

[1] Stat. 32 Hen. VIII. c. 34. This statute is not in force in Ohio, Connecticut, or South Carolina. See Appendix G.

[2] Wms. Real Prop. 202 and n.; Co. Lit. 215 *a*; 1 Burton, Real Prop. § 855; Hare's note to Dumpor's Case, 1 Smith, Lead. Cas. (5th Am. ed.) 92; Smith, Land. & Ten. 283-285; Fenn *v.* Smart, 12 East, 444; Van Rensselaer *v.* Hays, 19 N. Y. 68, 81.

[3] 1 Platt, Leases, 734.

[4] 2 Platt, Leases, 332.

[5] Twynam *v.* Pickard, 2 B. & A. 105.

[6] Cruger *v.* McLaury, 41 N. Y. 219, 225; Co. Lit. 215 *a*; Wright *v.* Burroughs, 3 C. B. 685, 700.

sion of a part of the land, though he cannot enter for a condition broken, may maintain an action of covenant by virtue of the statute.[1] This statute applies only to leases under seal, where there is a reversion in the lessor, and does not extend to covenants in deeds in fee.[2]

§ 654. **Condition broken not assignable at Law.** — But a covenant or condition already broken cannot be assigned so as to be taken advantage of or enforced by an assignee in his own name.[3]

§ 655. **Covenants guarded by Conditions.** — As the law now stands, therefore, not only the payment of rent, but the performance of any other covenant running with the estate, may be provided for by a condition for re-entry and forfeiture, by which the lessor or his heirs or assigns may enter and repossess the premises as if no lease had been made. Thus a covenant by lessee not to carry off any hay, under a penalty of £5, with a general clause of right of re-entry for breach of any of the covenants, worked a forfeiture of the estate, the lessee having broken that covenant.[4] So a condition in a lease that, if the lessee should fail to perform any of the covenants in the same, the lessor might enter and repossess the premises, and one of the covenants was, that the lessee should not occupy or suffer the premises to be occupied in a particular manner, which was broken, it was held, the devisees of the lessor might enter and defeat the estate for such occupation.[5] But in order to have the non-payment of rent a ground of forfeiture of the estate on the part of the lessee, the lease must contain a condition to that effect.[6] And that the breach of an implied condition shall be ground of forfeiture, the condition must be particular and not general.[7]

[1] Taylor, Land. & Ten. § 296.

[2] Wallace *v.* Vernon, 1 Kerr, N. B. 5, 22, 25; Lewes *v.* Ridge, Cro. Eliz. 863; Standen *v.* Chrismas, 10 Q. B. 135; Smith *v.* Eggington, L. R. 9 C. P. 145. In Allcock *v.* Moorhouse, 9 Q. B. 366, it was held that the assignees of a lessor from year to year could not sue the assignees of the lessee, because, as there was no seal, the statute Hen. VIII. did not apply, and statute 4 Anne, c. 16, did not, because there was no privity of estate.

[3] Burton, Real Prop. § 857; Burden *v.* Thayer, 3 Met. 76; Crane *v.* Batten, 28 E. L. & E. 137, where the covenant was to insure. Trask *v.* Wheeler, 7 Allen, 109.

[4] Doe *v.* Jepson, 3 B. & Ad. 402.

[5] Wheeler *v.* Earle, 5 Cush. 31.

[6] Brown *v.* Bragg, 22 Ind. 122.

[7] See *post*, § 666.

§ 656. **Construction and Application of Conditions.** — Causes of forfeiture are strictly construed.[1] The courts will save a forfeiture if it can fairly be done.[2] Among the cases illustrative of the strictness which courts apply in questions of this kind are the following: In Doe *v.* Stevens, the clause giving the right of re-entry was, "if the lessee shall do or cause to be done any act, matter, or thing contrary to, and in breach of, any of the covenants." The lease contained a covenant to repair. It was held, that the condition only related to some act done, and not to an omission to make repairs.[3] In Spear *v.* Fuller, the lessee covenanted, among other things, not to assign or underlet, and a condition was inserted that the lessor might enter and expel the lessee if he failed to pay rent or committed waste. An assignment by lessee was held to be a mere breach of the covenant, but not of the condition.[4]

§ 657. **Construction of Conditions, continued.** — So, though one covenant in a lease is, to surrender the premises upon a certain contingency, it does not give the lessor a right to enter and expel the lessee upon the happening of such contingency, unless there is a right of re-entry therefor reserved to the lessor in the lease.[5] And this applies to all covenants in leases: the lessor gains no right to re-enter and expel the lessee for a breach thereof, unless there is some proviso or condition contained in the lease giving such right of re-entry.[6] So, where the lessee agreed to surrender the premises at any time after so many months, on being paid so much money, it was held to be a covenant only and not a condition, nor a conditional limitation which would determine the lease. And it may be stated as a general proposition, that courts always construe similar clauses as covenants only, rather than conditions or conditional limitation.[7] Thus where the lease was to be void if the lessee

[1] Doe *v.* Bond, 5 B. & C. 855; Doe *v.* Stevens, 3 B. & Ad. 299; Doe *v.* Jepson, id. 402.

[2] Spear *v.* Fuller, 8 N. H. 174; Doe *v.* Stevens, *supra.*

[3] *Supra.*

[4] Spear *v.* Fuller, 8 N. H. 174; Burnes *v.* McCubbin, 3 Kan. 221.

[5] Dennison *v.* Read, 3 Dana, 586.

[6] Delancy *v.* Ganong, 9 N. Y. 9; Den *v.* Post, 25 N. J. 285; Brown *v.* Bragg, 22 Ind. 122; Tallman *v.* Coffin, 4 N. Y. 134; Shaw *v.* Coffin, 14 C. B. N. S. 372; Crawley *v.* Price, L. R. 10 Q. B. 302.

[7] Wheeler *v.* Dascombe, 3 Cush. 285; Doe *v.* Phillips, 2 Bing. 13.

assigned, it was held to be no breach to take in one or more co-tenants, or to underlet the premises.[1] Nor is it a breach of a condition in a lease not to alien, sell, assign, transfer, and set over, or otherwise part with, the lease or premises without license, to deposit the lease by way of security for money loaned.[2] Nor is it a breach of such condition to take in a lodger, although it be giving him exclusive possession of a chamber for a year, provided the lessee retain possession and control of the leased premises as a whole.[3] And where the lessor entered upon and took possession of the premises, and while he so held them the lessee's covenant as to keeping the premises in repair was broken, it was held that the lessor could not take advantage of the condition with respect to such repairs on account of any breach arising while the premises where in his possession.[4] So where, by the terms of his lease, the tenant was to remove certain buildings in a manner described, it was held that he might do this at any time during his term.[5]

§ 658. **The Effect of an Entry by a Lessor** or his assigns, where he may lawfully make it for breach of some condition, as the performance of a covenant in a lease, is, as already stated, to determine the estate of the tenant altogether, and wholly revest the same in the lessor or his assigns.[6] But this does not impair the lessor's right to recover rent up to the time of the forfeiture incurred.[7] And where the lessor was by the terms of his lease to pay for improvements at the end of the term, but entered and put an end to the lease for acts of forfeiture done by the lessee, it was held that the lessee had no claim to recover for such improvements until the natural expiration of the original

[1] Hargrave *v.* King, 5 Ired. Eq. 430; Spear *v.* Fuller, 8 N. H. 174; Crusoe *v.* Bugby, 2 Wm. Bl. 766. But a condition not to "set, let, or assign over the whole or any part of the premises, on pain of forfeiture, etc., would, by underletting, work a forfeiture." Roe *v.* Harrison, 2 T. R. 425; Smith, Land. & Ten. 116, n.

[2] Doe *v.* Hogg, 1 C. & P. 160; Doe *v.* Laming, Ry. & M. 36; Taylor, Land. & Ten. § 406.

[3] Taylor, Land. & Ten. § 405; Com. Land. & Ten. 236; Brewer *v.* McGowen, L. R. 5 C. P. 239; Cook *v.* Humber, 11 C. B. N. S. 33, 46; Greenslade *v.* Tapscott, 1 Cr. M. & R. 55; Biery *v.* Zeigler, 93 Penn. St. 367.

[4] Pellatt *v.* Boosey, 11 C. B. N. S. 885; 1 Roll. Abr. 453.

[5] Palethorp *v.* Bergner, 52 Penn. St. 149.

[6] Mackubin *v.* Whetcroft, 4 Harr. & McH. 135.

[7] Mattice *v.* Lord, 30 Barb. 382.

term.[1] But until such re-entry is actually made, the estate remains in the lessee or his assigns, in the same manner as before, since the breach of the condition does not, of itself, operate like a conditional limitation to determine the estate.[2]

§ 659. **How Advantage taken of Condition broken.** — In order to avail himself of his right to enter and defeat the estate of the lessee for a breach of condition, there are certain things required by the common law to be done by the reversioner, in respect to which the law is quite strict, unless the parties shall, by agreement, have substituted something in its stead. These are enumerated in a note to Saunders's Reports, and are as follows: If the condition be for the payment of rent, there must be, 1. A demand of the rent precisely upon the day when the rent is due and payable by the lease, to save the forfeiture.[3] But where the covenant with condition, and a right of re-entry for a breach, was to pay the taxes assessed upon the premises, it was held, that the lessor need not make demand of the taxes in order to give him a right to enter for the non-payment.[4] But in a case in Indiana, where by the terms of the lease the lessee was to pay the taxes, it was held, that the lessor, before entering to enforce a forfeiture for neglect on the part of the lessee to pay them, ought to demand payment of him.[5] 2. It must be made a convenient time before sunset.[6] 3. It must be made upon the land, at the most notorious place upon it, which would be the front door of the dwelling-house if there was one upon the land, unless some other place is agreed upon by the parties. Nor does it obviate the necessity of an actual demand that there is no one present upon whom to make it. And a demand made after or before the proper time, or at an improper place, will not authorize an entry to defeat the estate.[7] [And

[1] Lawrence *v.* Knight, 11 Cal. 298.

[2] Fifty Assoc. *v.* Howland, 11 Met. 99; Western Bank *v.* Kyle, 6 Gill, 343; Proctor *v.* Keith, 12 B. Mon. 252; Doe *v.* Birch, 1 M. & W. 402; Garner *v.* Hannah, 6 Duer, 262; Elliott *v.* Stone, 1 Gray, 571.

[3] Duppa *v.* Mayo, 1 Saund. 287, n. 16; Doe *v.* Wandlass, 7 T. R. 117.

[4] Byrane *v.* Rogers, 8 Minn. 281.

[5] Meni *v.* Rathbone, 21 Ind. 454.

[6] Jenkins *v.* Jenkins, 63 Ind. 415.

[7] Jackson *v.* Kipp, 3 Wend. 230; M'Murphy *v.* Minot, 4 N. H. 251; Jones *v.* Reed, 15 N. H. 68; Mackubin *v.* Whetcroft, 4 Harr. & McH. 135; Jackson *v.* Harrison, 17 Johns. 66; Remsen *v.* Conklin, 18 Johns. 447; Bradstreet *v.* Clark,

in every case, in order that non-payment of rent may be a ground of forfeiture, time must be of the essence of the contract.[1]] The rule above stated has been substantially reaffirmed by the modern English cases as well as by numerous American cases. In one, the time at which the rent must be demanded is fixed at sunset.[2] In another, a demand at ten o'clock in the forenoon of the last day was held to be too early.[3] In another, proof of its having been *in the afternoon* was held not to be sufficiently precise.[4] But the statement of the time as above given by Coke seems to be the rule now recognized by the courts. And where the condition is the performance of something other than the payment of rent, as the giving of a bond with surety, at the end of each year, for the rent of the ensuing year, the necessity of demand is the same.[5]

§ 660. **Particularity of Demand.** — The demand, moreover, must be of the precise amount due on the day it becomes due.[6] And yet, though it must be demanded before sundown long enough to have light by which to count the money in order to enforce a forfeiture, the rent is not in fact due till the last minute of the natural day, for if the lessor dies after sunset, and before midnight, the rent goes to the heir with the reversion, and not to the executor.[7]

21 Pick. 389; Co. Lit. 202 *a*; Maund's Case, Rep. 28; Smith *v.* Whitbeck, 13 Ohio St. 471; Byrane *v.* Rogers, 8 Minn. 281; Tate *v.* Crowson, 6 Ired. 65; McGlynn *v.* Moore, 25 Cal. 384; Chapman *v.* Harney, 100 Mass. 353; Bacon *v.* W. Furn. Co., 53 Ind. 229; Chapman *v.* Kirby, 49 Ill. 211; Chadwick *v.* Parker, 44 Ill. 326. But by statute in Illinois, the tenant has ten days after demand made in which to pay the rent and save a forfeiture. Ibid.

[1] Lynch *v.* Versailles, 165 Penn. St. 518; s. c. 30 Atl. Rep. 984.

[2] Per Ld. Hale, Duppa *v.* Mayo, 1 Saund. 287.

[3] Acocks *v.* Philips, 5 Hurlst. & N. 183.

[4] Jackson *v.* Harrison, 17 Johns. 66. In Jenkins *v.* Jenkins, 63 Ind. 415, it was required to be just before sunset. See also Chapman *v.* Wright, 20 Ill. 120; McQuesten *v.* Morgan, 34 N. H. 400; Acad. of Music *v.* Hackett, 2 Hilton, 217, 229, 232; Jewett *v.* Berry, 20 N. H. 36; Kimball *v.* Rowland, 6 Gray, 224; Phillips *v.* Doe, 3 Ind. 132; Gaskill *v.* Trainer, 3 Cal. 334; and American cases in note, 5 Hurlst. & N. 184.

[5] Den *v.* Crowson, 6 Ired. 65.

[6] Doe *v.* Paul, 3 C. & P. 613; M'Cormick *v.* Connell, 6 S. & R. 151; Sperry *v.* Sperry, 8 N. H. 477; Conner *v.* Bradley, 1 How. 211; Acad. of Music *v.* Hackett, 2 Hilton, 232; People *v.* Dudley, 58 N. Y. 323.

[7] Co. Lit. 202 *a*, n. 87; Duppa *v.* Mayo, 1 Saund. 287; Rockingham *v.* Oxenden, 2 Salk. 578; Acad. of Music *v.* Hackett, *supra*.

§ 661. **Demand waived.** — Sometimes the parties agree that upon the non-payment of the rent the lessor may enter for breach of the condition without previous demand, and in such case a previous demand is unnecessary.[1]

§ 662. **Necessity for Entry.** — But independently of the effect arising from the confession of entry, in an action of ejectment, it seems to be necessary that an actual entry should always be made by the owner of the reversion for breach of a condition of renting in order to complete the forfeiture and defeat the lease.[2] But it does not appear that it is requisite that this entry should be made at any particular time after the right to make it accrues, provided the lessor do no act, such as accepting rent for the premises accruing after the breach of the condition, which would amount to a waiver of the forfeiture,[3] unless there is an express stipulation that the right to enter for forfeiture is not thereby waived.[4] Such acceptance of rent would have that effect, but it must be rent which became due after the breach of the condition.[5] And the same would be the effect of bringing an action for rent accruing after the breach of covenant, if this were known to the lessor at the time of commencing the action.[6] But in England, and, it would seem, in those States where the technical action of ejectment is in use for the recovery of lands, a lessor may recover his term for a breach of a condition which works a forfeiture, without any formal entry made, as the form of the process assumes such entry to have been made.[7]

[1] Doe *v.* Masters, 2 B. & C. 490; Fifty Assoc. *v.* Howland, 5 Cush. 214; 2 Platt, Leases, 338; Byrane *v.* Rogers, 8 Minn. 281; Sweeney *v.* Garnett, 2 Disney, 601; Shaufelter *v.* Horner, 81 Md. 621; s. c. 32 Atl. Rep. 184.

[2] Duppa *v.* Mayo, 1 Saund. 287 *c*, note; 1 Smith, Lead. Cas. (5th Am. ed.) 89; Jones *v.* Carter, 15 M. & W. 718. Unless by its terms the lease is to become void, and then it is at lessor's option to determine. See *post*, § 664.

[3] Doe *v.* Allen, 3 Taunt. 78; Doe *v.* Bancks, 4 B. & A. 401.

[4] Miller *v.* Prescott, 163 Mass. 12; s. c. 39 N. E. Rep. 409; s. c. 47 Am. St. Rep. 434. And see, on the whole subject, a note in 47 Am. St. Rep. 197, to the case of Moses *v.* Loomis, 156 Ill. 392.

[5] Smith, Land. & Ten. 114; Hartshorne *v.* Watson, 4 Bing. N. C. 178; Price *v.* Worwood, 4 Hurlst. & N. 512; Toleman *v.* Portbury, L. R. 7 Q. B. 244; 2 Platt, Leases, 468, 470; Co. Lit. 211 *b*; Bleecker *v.* Smith, 13 Wend. 530; Hunter *v.* Osterhoudt, 11 Barb. 33; Richburg *v.* Bartley, Busbee (N. C.), 418. Coon *v.* Brickett, 2 N. H. 163, and a dictum in Bacon *v.* W. Furn. Co., 53 Ind. 779, *contra*, are clearly not law. See also 1 Smith, Lead Cas. (5th Am. ed.) 96.

[6] Dendy *v.* Nichol, 4 C. B. N. S. 376.

[7] 2 Platt, Leases, 331; Doe *v.* Masters, 2 B. & C. 490; Goodright *v.* Cator,

§ 663. **Forfeiture saved by Tender.** — A forfeiture may be avoided, even after such a demand has been made by lessor as before mentioned, by the lessee's tendering the rent due at any time long enough before twelve o'clock at night to count the money, although as a general rule a tender to be effectual must be made before sundown. And if there is no place fixed for making the payment, the tenant may save a forfeiture by going upon the premises at a proper time, and actually tendering it there. But merely having the money there without offering it would not be sufficient.[1]

§ 664. **Acceptance of Rent, when Waiver of Forfeiture.** — There are other cases where the acceptance of rent may be a waiver of a forfeiture, where the breach of the condition has consisted in other things than the non-payment of rent; and, in still other cases, such acceptance of rent will not be construed into a waiver; while it is universally true, that no such act as acceptance of rent will be construed into a waiver of a forfeiture, unless the fact of the breach of the condition was known to the lessor at the time.[2] But in those cases where the condition is, that for non-payment of rent and the like, the lease shall be null and void, and the lessor demands the rent, and lessee neglects to pay, or lessee is guilty of any other breach of the condition, giving the right of re-entry accordingly, the lease is absolutely determined, and cannot be set up by subsequent acceptance of rent.[3] But this is at the election of the lessor, as the lessee can never set up his own wrong as avoiding a lease.[4] If the lease provides that it may be lawful for the lessor to re-enter upon the non-payment of rent, and, instead of doing

Doug. 478, 485; Little *v.* Heaton, 2 Ld. Raym. 751; 1 Smith, Lead. Cas. (5th Am. ed.) 70; Jones *v.* Carter, 15 M. & W. 718; Jackson *v.* Crysler, 1 Johns. Cas. 125.

[1] Sweet *v.* Harding, 19 Vt. 587; Haldane *v.* Johnson, 8 Exch. 689.

[2] Clarke *v.* Cummings, 5 Barb. 339; Jackson *v.* Brownsou, 7 Johns. 227; Doe *v.* Bliss, 4 Taunt. 735; O'Keefe *v.* Kennedy, 3 Cush. 325; Murray *v.* Harway, 56 N. Y. 343; Fryett *v.* Jeffreys, 1 Esp. 393; Gomber *v.* Hackett, 6 Wis. 323; Camp *v.* Pulver, 5 Barb. 91; Bleecker *v.* Smith, 13 Wend. 530; McGlynn *v.* Moore, 25 Cal. 384; Jackson *v.* Allen, 3 Cow. 220. See also the American cases collected in note to 4 C. B. N. S. (Am. ed.) 387; Barroilhet *v.* Battelle, 7 Cal. 450.

[3] Duppa *v.* Mayo, 1 Saund. 287 *c*, n.; Pennant's Case, 3 Rep. 64.

[4] Cartwright *v.* Gardner, 5 Cush. 273, 281; Bemis *v.* Wilder, 100 Mass. 446; Rogers *v.* Snow, 118 Mass. 118; Bartley *v.* Phillips, 165 Penn. St. 325; s. c. 30 Atl. Rep. 842; *ante*, § 652.

this, he distrains for it after having demanded it, he thereby affirms the lease, and admits its continuance.[1] But the mere standing by, while the tenant does acts which violate the terms of the lease and work a forfeiture, would be no waiver of the condition or the right to enforce it.[2]

§ 665. **Forfeitures, when saved by the Courts.** — And it is now settled, that in order to save a forfeiture for non-payment of rent, if the lessor brings his action of ejectment, and the lessee will bring the money due into court for the lessor, the courts of law as well as equity will stay the proceedings, provided the failure to pay was by accident, and not wilfully done.[3] But whether courts of equity will relieve from forfeiture where the liability for a breach of condition may be compensated in damages, "may be regarded as yet unsettled in the jurisprudence of this country." But this remark is to be taken in connection with other breaches than the non-payment of rent. In respect to that, the English and American law, as well as courts of law and equity, substantially agree in giving relief if the arrears of rent, interest, and costs are paid or tendered.[4] The extent to which courts aid parties who are not in fault in saving their estates from forfeiture by reason of non-performance of conditions in leases is illustrated in the case where the term was for one thousand years, the rent being payable in *Russia Sables Iron*, for which the lessor had for forty years accepted money without objection by way of commutation. At the end of that time, the iron was demanded and insisted on; but none was to be had in the market, as it had ceased to be imported. The court, upon application made, gave the lessee time in which to send to Russia for the requisite iron before enforcing the forfeiture.[5]

§ 666. **Implied Covenants and Trivial Breaches.** — If a lease

[1] Duppa *v.* Mayo, 1 Saund. 287 *c*, n.; Pennant's Case, 3 Rep. 64; Jackson *v.* Sheldon, 5 Cow. 448; McKildoe *v.* Darracott, 13 Gratt. 278. In Illinois, a distress warrant for rent cannot issue after six months from the time the rent falls due. Werner *v.* Ropiequet, 44 Ill. 522.

[2] Perry *v.* Davis, 3 C. B. N. S. 769, 773.

[3] Atkins *v.* Chilson, 11 Met. 112; Garner *v.* Hannah, 6 Duer, 262.

[4] Sheets *v.* Selden, 7 Wall. 416; Story, Eq. §§ 1315, 1316. See also Chadwick *v.* Parker, 44 Ill. 326, 330.

[5] Lilly *v.* Fifty Associates, 101 Mass. 432.

provide that a breach of any of the covenants therein shall work a forfeiture, this will apply only to the express covenants. That the breach of an implied covenant may work a forfeiture, it must be expressly so stated.[1] Nor will the courts enforce forfeiture for trivial breaches of the conditions of a lease.[2]

[1] Harris *v.* The Ohio Oil Co., 57 Ohio St. 118 ; s. c. 48 N. E. Rep. 502.

[2] Randol *v.* Scott, 110 Cal. 590 ; s. c. 42 Pac. Rep. 976; Lundin *v.* Schoeffel, 167 Mass. 465 ; s. c. 45 N. E. 933.

CHAPTER XXII.

ESTATES FOR YEARS — OF COVENANTS IN LEASES.

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685. Lessee's liability for rent after destruction of premises.
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687. Inconsistent covenants.

§ 667. **Scope of the Term.** — As it is difficult to conceive of a lease which does not contain some covenant, express or implied, upon the part of lessor or lessee, or both, covenants in leases for years become an important branch of the subject of such estates. A question has been raised by conflicting decisions of different courts, whether one can be sued in covenant who is named in a sealed instrument, deed poll, or indenture, as a party to it, which is accepted by him, if, by the terms of it, he is to do certain things which he fails to perform, but the same has not been executed on his part; while in New York it is now held, as it is in New Jersey, that an action of covenant

broken would lie in such a case.[1] The cases cited below hold that the proper remedy is in assumpsit, or at least that covenant would not lie.[2] "The word 'covenant,' in strictness, does not apply otherwise than to such agreements as are executed under the solemnity of a seal; but, in common parlance, it is applied to any agreement, whether under seal or not." And it is so applied in the case cited below.[3]

§ 668. **Kinds of Covenants.** — These covenants are either implied or express, or, what is the same thing, covenants in law or in deed. And the same covenant may be the separate covenant of one of the parties, or that of both, according as it applies to one or both of them.[4] Implied are such as arise by construction of law from the use of certain terms and forms of expression which are uniformly held to constitute an agreement, though no express words of covenant or agreement are connected with them. Among these are "grant," "demise," "lease," and the like. From the word "demise," in a lease under seal, the law implies a covenant, in a lease not under seal, a contract for title to the estate merely, that is for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word "let," or any equivalent words which constitute a lease, have the same effect, but no more.[5] The tendency of modern decisions is against implying covenants, which might and ought to have been expressed, if intended.[6] The presumption, where parties have entered into written engagements with express stipulations, is that, having expressed some,

[1] Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35; Finley *v.* Simpson, 22 N. J. 311. But where a lease under seal was taken in the name of an agent, no action would lie against the principal, though he had entered and occupied. Kiersted *v.* Orange R. R., 69 N. Y. 343. The rule of ratification seems, however, different in other States. See Cady *v.* Shepherd, 11 Pick. 400; McIntyre *v.* Park, 11 Gray, 102.

[2] *Post*, § 2191; Goodwin *v.* Gilbert, 9 Mass. 510; Nugent *v.* Riley, 1 Met. 117; Newell *v.* Hill, 2 Met. 180; Pike *v.* Brown, 7 Cush. 133; Hinsdale *v.* Humphrey, 15 Conn. 431; Maule *v.* Weaver, 7 Penn. St. 329; Johnson *v.* Mussey, 45 Vt. 419; Gale *v.* Nixon, 6 Cowen, 445; Trustees, etc. *v.* Spencer, 7 Ohio, pt. 2, 149; Burnett *v.* Lynch, 5 B. & C. 589; Platt on Cov. 18; Clark *v.* Gordon, 121 Mass. 330; Carroll *v.* St. John Soc., 125 Mass. 565.

[3] Hayne *v.* Cummings, 16 C. B. N. S. 421, 426.

[4] Beckwith *v.* Howard, 6 R. I. 1.

[5] Hart *v.* Windsor, 12 M. W. & 68, 85; Lanigan *v.* Kille, 97 Penn. St. 120.

[6] Sheets *v.* Selden, 7 Wall. 416, 423.

they have expressed all the conditions by which they intend to be bound under the instrument.[1]

§ 668 *a*. **Implied Covenants by Lessor.** — Thus the word "grant," or "demise," once implied an absolute covenant on the part of the lessor for the lessee's quiet enjoyment during the term, unless this were qualified, as it may be, by a more limited express covenant.[2] So the word "lease" has been held to be equivalent to "demise" in creating an implied covenant.[3] These words *lease* or *demise* imply a covenant against a paramount title, and against acts of the landlord which destroy the beneficial enjoyment of the premises;[4] and this extends to a demise of a right to collect wharfage for a term of time, although not corporeal property in its character,[5] and furthermore that, if the lessee is evicted by a paramount title, he will be discharged from payment of rent.[6] But if one lease the mines or veins of ore in certain lands, he does not thereby warrant that there are such minerals there; and if it turns out that there are none, nothing passes by the lease.[7] The law as well as the reason of it, in respect to these implied covenants, so far as it was applicable to the case then under consideration, was thus satisfactorily stated by Shaw, C. J., in Dexter *v.* Man-

[1] Aspdin *v.* Austin, 5 Q. B. 671, 684. Thus, in New York, it was held that in a carefully drawn lease no covenant on the part of a lessee to take a renewal is implied from a covenant on the part of the lessor to grant one. Bruce *v.* Fulton Bank, 79 N. Y. 154.

[2] Burton, Real Prop. § 846. But, by statute now in England, "grant" no longer implies a covenant in law. Stat. 8 & 9 Vict. c. 106, § 5; Smith, Land. & Ten. 68. But the word "demise" still retains this power. Wms. Real Prop. 367. In New York all actions upon implied covenants in the conveyance of lands are taken away by statute, as held in Kinney *v.* Watts, 14 Wend. 38, the correctness of which has been questioned. See Lalor, Real Est. 246; Tone *v.* Bruce, 8 Paige, 597; Williams *v.* Burrell, 1 C. B. 402, 429; Platt, Cov. 47; Rawle, Cov. 362, n.; Mayor *v.* Mabie, 13 N. Y. 151, 160, commenting on Kinney *v.* Watts. See Mack *v.* Patchin, 42 N. Y. 167.

[3] Maule *v.* Ashmead, 20 Penn. St. 482; Ross *v.* Dysart, 33 Penn. St. 152; Maeder *v.* Carondelet, 26 Mo. 112; Hamilton *v.* Wright, 28 Mo. 199. See *contra*, Lovering *v.* Lovering, 13 N. H. 513.

[4] Wade *v.* Halligan, 16 Ill. 507; Playter *v.* Cunningham, 21 Cal. 229. "Grant and demise" in a lease amount to an implied covenant for quiet enjoyment.

[5] Mayor *v.* Mabie, 13 N. Y. 151.

[6] Wells *v.* Mason, 4 Scam. 84.

[7] Harlan *v.* Lehigh Coal Co., 35 Penn. St. 287. No implied covenant that premises are fit for occupation. Edwards *v.* N. Y. & H. R. R. Co., 98 N. Y. 245; Naumberg *v.* Young, 44 N. J. L. 332.

ley, where the terms used were "has demised and leased." "It is sufficient for the present case that the lease contains an implied covenant which is a good warranty by the defendant (the lessor) against his own acts. Every grant of any right, interest, or benefit, carries with it an implied undertaking on the part of the grantor that the grant is intended to be beneficial, and that, so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the thing granted."[1] "Every lease," say the court of Pennsylvania, "implies a covenant for quiet enjoyment. But it extends only to the possession; and its breach, like that of a warranty for title, arises only from eviction by means of title. It does not protect against entry and ouster of a tort-feasor." A tenant has a right to call his landlord into defence; and, if eviction follows as the result of the failure to defend him, he can then refuse to pay rent, and fall back upon his covenant for quiet enjoyment to recover his damages.[2] So a covenant for quiet enjoyment is implied in a lease of an incorporeal hereditament.[3]

§ 668 *b*. **Implied Covenants by Lessor, continued.** — Though the subject of implied covenants in leases is too broad to be embraced in its details in a work like the present, the reader may find it discussed in some of its bearings by Mr. Butler.[4] And it may be remarked that a covenant of quiet enjoyment in a lease, whether express or implied, relates only to possession under title, and not to the undisturbed enjoyment of the premises demised, where there has been no eviction.[5] The lessor does not warrant against the acts of strangers,[6] nor agree to put the lessee into possession.[7] The extent of his

[1] Dexter *v.* Manley, 4 Cush. 14, 24. A lessor is, therefore, as liable for the acts of one under his authority as for his own. Sherman *v.* Williams, 113 Mass. 481. Where there is an implied contract in a lease, it relates only to the estate, not the condition of the property. Hart *v.* Windsor, 12 M. & W. 86.

[2] Schuylkill, etc. R. R. *v.* Schmoele, 57 Penn. St. 271, 273.

[3] Mayor *v.* Mabie, 13 N. Y. 151.

[4] Co. Lit. 384 *a*, note.

[5] Edgerton *v.* Page, 1 Hilton, 320, 333; Platt, Cov. 312; Underwood *v.* Birchard, 47 Vt. 305.

[6] Lounsberry *v.* Snider, 31 N. Y. 514; Schilling *v.* Holmes, 23 Cal. 227; Branger *v.* Manciet, 30 Cal. 624; Hayes *v.* Bickerstaff, Vaughan, 118; Moore *v.* Weber, 71 Penn. St. 429.

[7] *Ante*, § 615.

implied engagement is, that he has a good title, and can give a free, unincumbered lease for the time demised.[1] And where the lessor had only an estate for life, and dies before the end of the term, the lessee cannot have an action against the lessor's estate for eviction by the remainder-man, if the only covenant was that implied from the word "demise."[2] It would be otherwise, if the lessor had further a power of appointment under the exercise of which the term could have been made good.[3] Still, every lease implies a covenant of quiet enjoyment; and if the premises are recovered by a third party against the tenant, the rent is gone, though the tenant attorn to the one recovering such judgment, before the *habere facias* shall have been served. Nor could the lessor recover of the tenant rent accruing during such period of eviction, even though he may sue a new action, and recover a judgment for possession of the premises. The lessor's remedy for the intermediate rents would be against his adversary in such second suit, while the tenant, in such a case, would attorn to him again as his lessor.[4] A lessor as such, in the absence of some covenant or agreement to that effect, is not bound to make repairs upon the leased premises.[5] But if the lessor voluntarily undertakes to repair the premises, and do it in so careless a manner as to cause an injury thereby to the tenant, he will be liable in damages therefor.[6] If he covenants to build a certain building upon the premises, and do so, and the same is destroyed, he is not bound to rebuild it.[7] Nor is he bound to compensate the lessee for repairs made by him.[8] But where one made repairs or did work upon premises under a parol promise of the owner to let them to him, and the owner then

[1] Mechan. Ins. Co. *v.* Scott, 2 Hilton, 550; Playter *v.* Cunningham, 21 Cal. 229.

[2] McClowry *v.* Croghan, 1 Grant Cas. 307, 311.

[3] Hamilton *v.* Wright, 28 Mo. 199; Adams *v.* Gibney, 6 Bing. 656.

[4] Ross *v.* Dysart, 33 Penn. St. 452. See Morse *v.* Goddard, 13 Met. 177. Nor is the lessor, if the premises are destroyed, bound to apply the insurance money to rebuilding them. Leeds *v.* Cheetham, 1 Sim. 146; Holtzapffel *v.* Baker, 18 Ves. 115; Loft *v.* Dennis, 1 Ellis & E. 474. See *post*, § 721.

[5] See *post*, § 686.

[6] Gill *v.* Middleton, 105 Mass. 477.

[7] Cowell *v.* Lumley, 39 Cal. 151.

[8] Cases, note *supra*.

refused to lease them to him, it was held he could recover of the owner for the same,[1] and conversely when the lessor agrees to do repairs before the lease, the tenant may refuse to occupy if these are not done.[2] Nor is he bound to protect his tenant from the consequences of the act of an adjoining owner, whether lawful or not, in excavating his land so near the demised premises as to cause injury to them.[3] So where one held a term under a lease, by which, if the lessors sold the premises, they could determine the lease by giving so many days' notice, and made an underlease for a certain time, using the words "lease, demise, and let," but in the underlease there was a proviso that the sub-tenant could carry away improvements made by him, "in case the land is sold," it was held that the latter had no cause of action upon the implied covenant in his lease in consequence of the term being defeated by a sale of the premises by the original lessors. So far as the words above mentioned implied a warranty of title, they were qualified by the proviso in the lease.[4] But a lessor may bind himself to repair the premises, and if by the terms of his lease he has a right to enter and view and make improvements, he is bound to make the necessary repairs, without waiting for a special demand or notice so to do.[5]

§ 669. **Lessee not absolved by Lessor's Default.** — The lessee, however, is not absolved from paying rent, if the lessor, in such a case, fails to make the repairs, nor would it amount to an eviction, or justify his abandoning the possession of the premises. His remedy is by an action against the lessor upon his covenant or agreement.[6] So where a lessee has actually entered

[1] White *v.* Wieland, 109 Mass. 291 ; Williams *v.* Bemis, 108 Mass. 91.

[2] Strohecker *v.* Barnes, 21 Ga. 430.

[3] Sherwood *v.* Seaman, 2 Bosw. 127 ; McCarty *v.* Ely, 4 E. D. Smith, 375 ; Howard *v.* Doolittle, 3 Duer, 464. See Pargoud *v.* Tourne, 13 La. Ann. 292 ; Gill *v.* Middleton, *supra.*

[4] O'Connor *v.* Daily, 109 Mass. 235.

[5] Hayden *v.* Bradley, 6 Gray, 425. See Vyse *v.* Wakefield, 6 M. & W. 442, 452, 453 ; Keys *v.* Powell, 2 A. K. Marsh. 254.

[6] Tibbetts *v.* Percy, 24 Barb. 39 ; Speckels *v.* Sax, 1 E. D. Smith, 253 ; Hexter *v.* Knox, 63 N. Y. 561 ; Leavitt *v.* Fletcher, 10 Allen, 119 ; Wright *v.* Lattin, 38 Ill. 293. But by statute in New York, Laws of 1860, c. 345, if the premises are destroyed by sudden casualty, the tenant is not held for rent, if the landlord does not rebuild. Suydam *v.* Jackson, 54 N. Y. 450.

under his lease, and is sued for rent, he cannot set up in defence a failure on the part of his lessor to do certain agreed acts in relation to the premises. He may, in such case, recoup in damages for the lessor's breach, or may have a separate action therefor, but is not exonerated from liability to pay rent.[1]

§ 670. **Implied Covenants by Lessee.** — There are covenants also implied on the part of the lessee, as that to pay the rent, resulting from the formal words "yielding and paying" a stipulated sum.[2] And the very acceptance of a lease imposes upon the lessee an implied obligation to use the premises in a proper and husbandlike manner.[3] Mr. Comyns states the implied covenant or obligation of a lessee growing out of the relation of landlord and tenant to be, to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee. He is bound, therefore, to keep the soil in a proper state of cultivation, to preserve the timber, and to support and repair the buildings. These duties fall upon him without any express covenant on his part, and a breach of them will, in general, render him liable to be punished for waste.[4] Where one took a lease of a farm dated July 18, while there was a crop of hay upon the premises, for five years, and in the fifth year cut the grass on the 10th of July, and took the crop, it was held to be no violation of his covenant as being against the rules of good husbandry, although he thereby took six crops from the land within his term of five years.[5] In Illinois, it is held to be the duty of a tenant to pay all taxes assessed upon the premises

[1] Kelsey *v.* Ward, 38 N. Y. 83. But mere trespasses by the landlord do not give the tenant a right to recoup. Bartlett *v.* Farrington, 120 Mass. 284.

[2] Smith, Land. & Ten. 96; Platt, Cov. 42; Royer *v.* Ake, 3 Penn. 461; Kimpton *v.* Walker, 9 Vt. 191; Van Rensselaer *v.* Smith, 27 Barb. 104, 110. See further as to rent, *post*, § 711.

[3] Nave *v.* Berry, 22 Ala. 382; Miller *v.* Shields, 55 Ind. 71; United States *v.* Bostwick, 94 U. S. 53; and see Aughinbaugh *v.* Coppenheffer, 55 Penn. St. 347. An express covenant personally to yield up the premises in good repair is not broken by leaving quantities of rubbish upon the premises. Thorndike *v.* Burrage, 111 Mass. 531.

[4] Com. Land. & Ten. 188.

[5] Willey *v.* Connor, 44 Vt. 68.

during his tenancy; and if he fails to do this, and the land be sold for taxes, and he purchases it, he cannot hold it against the owner of the inheritance.[1] If the lessee covenant to pay the taxes assessed upon the leased premises, and fails to do so, the lessor can recover the amount assessed, although he himself may not have paid them;[2] and if the premises are destroyed after the day when the tax is laid, but before the time for which it is payable has expired, the whole tax is recoverable under lessee's covenant.[3] What the extent of the lessee's covenant is may be seen more properly in a work of more special character than the present.[4]

§ 671. **Difference in Effect between Express and Implied Covenants.** — There is an important distinction to be observed between express and implied covenants in a lease, since one who enters into an express covenant remains bound by it though the lease be assigned over, while such as are implied are coextensive only with the occupation of the premises, the lessee, for instance, not being liable under his implied covenant for rent after his assignment to another, and the acceptance of rent by the lessor from the assignee.[5] The lessee remains liable upon his express covenant to pay rent, notwithstanding his having

[1] Prettyman *v.* Walston, 34 Ill. 175, 191. So in Maryland. Hughes *v.* Young, 5 Gill & J. 67. In Massachusetts the landlord is ultimately liable for the taxes assessed upon leased estates in the absence of a special agreement between him and the tenant. Pub. Stat. c. 11, § 17. Whether the landlord or the tenant is ultimately liable for the taxes, if no stipulation exists in regard to them, depends in England on the particular tax; but generally the claim being against the land the lessor is to bear it, and the tenant, if paying in the first instance, may deduct from the rent of the year, but not later. Taylor *v.* Zamira, 6 Taunt. 524; Carter *v.* Carter, 5 Bing. 406; Stubbs *v.* Parsons, 3 B. & A. 516; Denby *v.* Moore, 1 B. & A. 123.

[2] Trinity Ch. *v.* Higgins, 48 N. Y. 532.

[3] Sargent *v.* Pray, 117 Mass. 267; Minot *v.* Joy, 118 Mass. 308.

[4] Taylor, Land. & Ten. (8th ed.) §§ 397–399.

[5] Auriol *v.* Mills, 4 T. R. 94, 98; Rawle, Cov. 363, n.; Kimpton *v.* Walker, 9 Vt. 191; Walker *v.* Physick, 5 Penn. St. 193. The language of Shaw, C. J., in Patten *v.* Deshon, 1 Gray, 330, applies only where the lessor has expressly agreed to accept the assignee as alone liable for the rent, it being in effect a surrender by lessee. Thursby *v.* Plant, 1 Saund. 240; Way *v.* Reed, 6 Allen, 364, 369; 7 Am. L. Rev. 244; Pfaff *v.* Golden, 126 Mass. 402. But where the assignee of the lessee assigned with the lessor's permission for a different business than that which the lessee stipulated for, it was held to discharge lessee. Fifty Assoc. *v.* Grace, 125 Mass. 161.

assigned his lease with the lessor's assent, and the lessor may have accepted rent from the assignee.[1] The lessor, in such case, may sue the lessee or his assignee, or both, at his election, and at the same time, though he can have but one satisfaction. The lessee continues liable upon his personal covenant, in the nature of a surety for his assignee, who is ultimately liable to him for the amount paid by him.[2] But the liability of a lessee upon the implied covenants in his lease continues only so long as he holds the estate, where he assigns with the consent of the lessor, or it depends upon the privity of estate. This is true in respect to assignees, both as to express and implied covenants, and their liability depends upon and ceases with the privity of estate between them and the lessors. Such assignee, therefore, is not liable for any breach committed before he became assignee, nor for any such breach occurring after he has parted with the estate and possession to a new assignee, although he did this for the very purpose of escaping such liability, because, by so doing, he destroys the privity of estate on which it depends.[3] But, while the assignee continues to hold the estate, he would be liable for the rent fixed by the lease as it falls due without regard to the value of the premises,[4] and he may by his conduct or representations to the lessor be estopped to set up his assignment.[5] Nor does it matter how

[1] Greenleaf *v.* Allen, 127 Mass. 248; Deane *v.* Caldwell, id. 242, and cases in preceding note. But it is otherwise if the lessee was holding over when he assigned. Lodge *v.* White, 30 Ohio St. 569; *post*, § 683.

[2] But the lessee cannot recover till he has himself paid. Farrington *v.* Kimball, 126 Mass. 313; Moule *v.* Garrett, L. R. 5 Exch. 132; s. c. 7 id. 101.

[3] Hintze *v.* Thomas, 7 Md. 346; Walton *v.* Cronly, 14 Wend. 63; Platt, Cov. 490, 494; Paul *v.* Nurse, 8 B. & C. 486; Wolveridge *v.* Stewart, 1 Cr. & M. 644; Taylor *v.* Shum, 1 B. & P. 21; Harley *v.* King, 2 Cr. M. & R. 18, 22; Smith, Land. & Ten. 294; Patten *v.* Deshon, 1 Gray, 325, 329; Cuthbertson *v.* Irving, 4 Hurlst. & N. 742; Bagley *v.* Freeman, 1 Hilt. 196; Kain *v.* Hoxie, 2 Hilt. 311; Johnson *v.* Sherman, 15 Cal. 287; Quackenboss *v.* Clarke, 12 Wend. 555; Armstrong *v.* Wheeler, 9 Cow. 88; Williams *v.* Earle, 9 Best & S. 740. But in this last case it is held that, though the assignee is relieved from liability for subsequent breaches of covenant, he is still liable for assigning to a person of known irresponsibility. Tibbals *v.* Illand, 10 Wash. St. 451; s. c. 39 Pac. Rep. 102.

[4] Sanders *v.* Partridge, 108 Mass. 556; Taylor, Land. & Ten. § 449; Pitcher *v.* Tovey, 4 Mod. 71; Graves *v.* Porter, 11 Barb. 592; Burnett *v.* Lynch, 5 B. & C. 589; Grundin *v.* Carter, 99 Mass. 15.

[5] Meister *v.* Birney, 24 Mich. 435, 440.

he becomes such assignee. His liability would attach although he purchased the estate at a sheriff's sale.[1]

§ 672. **Covenants running with the Land.** — Another important distinction in respect to covenants in a lease is between such as run with the land, binding assignees, or enuring to the benefit of assignees, and such as are personal only and do not bind the estate. The reader is referred to what is found in a later part of this work[2] for an attempt to define how far, and in what cases, covenants run with lands. The subject is fully treated of in the American edition of Smith's Leading Cases,[3] in commenting upon Spencer's Case,[4] where the early law is embodied. There were some covenants, that, for instance, to pay rent, which raised a liability against the tenant in favor of an assignee of the reversion at the common law, the remedy being in debt but not in covenant, as the only privity between the parties was in estate and not in contract,[5] though it was held in one case hereafter referred to, that a covenant to grind at the lessor's mill might be sued by the devisee of the lessor against the administratrix of the lessee.[6] The object of the statute of 32 Hen. VIII. c. 34, was to extend the privity of contract from reversioner to reversioner, and the right to sue *in covenant* to actions by and against assignees.[7] Before the statute of 4 Anne, c. 16, § 9, although by an assignment of the reversion there was a privity of estate created between the tenant and the assignee, there was no privity of contract, and the assignee could not sue in covenant in his own name, unless the tenant had attorned to him. And now, inasmuch as the statute of Anne is not in force in Illinois, a purchaser of a reversion cannot sue for rent in his own name upon the covenant of the

[1] Sutliff *v.* Atwood, 15 Ohio St. 186, 198; Hornby *v.* Houlditch, Andrews, 40; Taylor, Land. & Ten. 214; Thursby *v.* Plant, 1 Saund. 241 *b*, note; *post*, § 682; Com. Land. & Ten. 257, 275.

[2] *Post*, § 1202.

[3] Vol. i. (5th Am. ed.) p. 139 *et seq.*

[4] 5 Rep. 16.

[5] Thursby *v.* Plant, 1 Saund. 240; Patten *v.* Deshon, 1 Gray, 325.

[6] Vyvyan *v.* Arthur, 1 B. & C. 410. See also Platt, Cov. 532; 2 Platt, Leases, 87, 382; Brett *v.* Cumberland, Cro. Jac. 522; Porter *v.* Swetnam, Styles, 406; Van Rensselaer *v.* Hays, 19 N. Y. 68, 81.

[7] Patten *v.* Deshon, *supra*; Platt, Cov. 533, 534; Van Rensselaer *v.* Smith, 27 Barb. 104, 151; Cook *v.* Brightly, 46 Penn. St. 439, 445.

lessee without showing something answering to an attornment.[1] The statute of Henry VIII. is held to be in force in New Hampshire,[2] Massachusetts,[3] Connecticut,[4] Maryland,[5] New Jersey,[6] Pennsylvania,[7] Virginia,[8] Illinois,[9] Missouri,[10] North Carolina,[11] and Alabama,[12] but was not in New York till re-enacted; and it is there made to extend to grants in fee where rent is reserved, and to leases for life or for years.[13] Nor is it in force in Ohio.[14]

§ 673. **Covenants running with the Land — Rule.** — So far as a covenant imposing a burden upon land is held to run with the estate or otherwise, the rule as stated by Gould, J., is definite, intelligible, and easy of application, depending upon whether such covenant entered or not into the original consideration upon which the conveyance, with which it was connected, was made; "since where the covenants are in the very conveyance by which the covenantor, etc., acquired his land, the performance of those covenants, etc., plainly *forms a part of* the consideration without which the conveyance would not have been made."[15]

§ 674. **What are Covenants running with the Land.** — Among

1 Fisher *v.* Deering, 60 Ill. 114; overruling Chapman *v.* McGrew, 20 Ill. 101.

2 Mussey *v.* Holt, 24 N. H. 248.

3 Howland *v.* Coffin, 12 Pick. 125; Patten *v.* Deshon, *supra.*

4 Baldwin *v.* Walker, 12 Conn. 168.

5 Funk *v.* Kincaid, 5 Md. 404.

6 1 Gen. Stat. 1895, p. 880.

7 Streaper *v.* Fisher, 1 Rawle, 155, 161.

8 Scott *v.* Lunt, 7 Pet. 605.

9 Plumleigh *v.* Cook, 13 Ill. 669.

10 Rev. Stat. 1899, § 4126.

11 Kornegay *v.* Collier, 65 N. C. 69.

12 English *v.* Key, 39 Ala. 113.

13 Van Rensselaer *v.* Smith, 27 Barb. 104, 151; Van Rensselaer *v.* Hays, 19 N. Y. 68, 81, 84; Nicholl *v.* N. Y. & E. R. R., 12 N. Y. 121, 131, 132; Willard *v.* Tillman, 2 Hill, 274, 276.

14 Masury *v.* Southworth, 9 Ohio St. 340; Crawford *v.* Chapman, 17 Ohio, 449.

15 Van Rensselaer *v.* Smith, 27 Barb. 104, 146. Therefore, an assignee of a lessor may have debt for rent against an assignee of the lessee where the letting has been by an indenture of lease. Howland *v.* Coffin, 12 Pick. 125. And the assignee of the lessee may take advantage of an option to purchase clause in the lease. Napier *v.* Darlington, 70 Penn. St. 64; Kerr *v.* Day, 14 Penn. St. 112; s. c. 53 Am. Dec. 526; Hall *v.* Center, 40 Cal. 63; Schroeder *v.* Franklin, 10 Nev. 355. But this proposition cannot be made to cover cases where the option is to

covenants running with the land are all implied covenants;[1] all covenants for quiet enjoyment;[2] covenants to pay rent;[3] to insure;[4] to repair, or to deliver up in good condition;[5] to reside on the premises;[6] or to pay taxes.[7] But though an assignee of the lessee would be bound, a sub-lessee would not, nor the assignee of such sub-lessee.[8] So various covenants not to do certain acts upon the premises are of this character, as where the lessor of a mill covenanted in his lease not to let or employ any other place or site on the same stream for a mill of a certain kind, the covenant was held to run with the land, and its breach might be sued for by an assignee.[9] So a covenant not to sell any wood or timber off the demised premises,[10] or one for a particular mode of cultivation or occupancy of the property,[11] or which concerns husbandry and repairs, runs with the land, and binds an assignee.[12] So a covenant for a perpetual or limited renewal runs with the land.[13] But where the lease provided for the

buy partly on credit, for that involves a relation of personal confidence, which is not the subject of assignment. Menger *v.* Ward, 87 Tex. 622 ; s. c. 30 S. W. Rep. 853.

[1] Smith, Land. & Ten. 287, n.; Platt. Cov. 42–44; 1 Smith, Lead. Cas. (5th Am. ed.) 123.

[2] Shelton *v.* Codman, 3 Cush. 318; Markland *v.* Crump, 1 Dev. & B. 94 ; Campbell *v.* Lewis, 3 B. & A. 392 ; s. c. 8 Taunt. 715 ; Smith, Land. & Ten. 288, n. ; Williams *v.* Burrell, 1 C. B. 402, 433.

[3] Hurst *v.* Rodney, 1 Wash. C. C. 375 ; Howland *v.* Coffin, 12 Pick. 125 ; Main *v.* Feathers, 21 Barb. 646; Jaques *v.* Short, 20 Barb. 269 ; Demarest *v.* Willard, 8 Cow. 206 ; Graves *v.* Porter, 11 Barb. 592.

[4] Vernon *v.* Smith, 5 B. & A. 1 ; Doe *v.* Peck, 1 B. & A. 428 ; Thomas *v.* Von Kapff, 6 Gill & J. 372.

[5] Demarest *v.* Willard, 8 Cow. 206; Pollard *v.* Shaaffer, 1 Dall. 210 ; Broom's Maxims, 553 ; Dean of Windsor's Case, 5 Rep. 24, though the covenant did not in terms bind assignees. Spencer's Case, 5 Rep. 16.

[6] Tatem *v.* Chaplin, 2 H. Bl. 133, though assignee be not named. Van Rensselaer *v.* Read, 26 N. Y. 558, 576.

[7] Dean of Windsor's Case, 5 Rep. 24 ; Kearney *v.* Post, 1 Sandf. 105; Astor *v.* Miller, 2 Paige, 68 ; Post *v.* Kearney, 2 N. Y. 394.

[8] Martin *v.* O'Connor, 43 Barb. 514 ; cf. Odell *v.* Solomon, 99 N. Y. 635.

[9] Norman *v.* Wells, 17 Wend. 136. See also, as to covenants in a lease of water-power running with the land used, Noonan *v.* Orton, 4 Wis. 335, 341 ; Morse *v.* Aldrich, 19 Pick. 449 ; Woolisèroft *v.* Norton, 15 Wis. 198, 204.

[10] Verplanck *v.* Wright, 23 Wend. 506.

[11] Woodfall, Land. & Ten. 81 ; St. And. Church App., 67 Penn. St. 512.

[12] Gordon *v.* George, 12 Ind. 408.

[13] Blackmore *v.* Boardman, 28 Mo. 420 ; Piggot *v.* Mason, 1 Paige, 412.

lessee enjoying the estate for a certain term, with a right to hold it as much longer as he should choose after the expiration of the term, at the same rate, no definite time being prescribed, it was held not to be a covenant running with the reversion so as to bind the assignee of the lessor; and the lessor having died during the term, the lessee having chosen to hold beyond the term, his tenancy became one from year to year, determinable by notice from the lessee or the owner of the reversion.[1] In order to avail himself of the benefit of a covenant to renew, the lessee must give notice of his election so to do before the expiration of the term.[2] So a covenant made by the lessor with the lessee to pay for new erections upon the premises runs with the land, and may be enforced by an assignee of lessee against the lessor.[3]

§ 675. **Rule restated.** — "If the performance of the covenant be beneficial to the reversioner in respect of the lessor's demand, and to no other person, his assignee may sue upon it; but if it be beneficial to the lessor without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue."[4] If the covenant be to do some act, but not upon the premises, and only collateral to these, such as to build a house upon other land of the lessor than that which is demised, or to pay a collateral sum to the lessor or to a stranger, it would not run with the land.[5]

§ 676. **Covenants run with Part of the Land.** — The statute of Henry VIII. does not extend to covenants merely collateral, but only such as concern the land demised;[6] and, under it, covenant will lie both by and against the assignee of the reversion of part of the premises,[7] although the assignee of

[1] West Trans. Co. *v.* Lansing, 49 N. Y. 499.

[2] Renoud *v.* Daskam, 34 Conn. 512.

[3] Hunt *v.* Danforth, 2 Curt. C. C. 592. But it does not run with the reversion so as to bind the assignee thereof. Smith, Land. & Ten. 290, 291; 2 Platt, Leases, 406; Tallman *v.* Coffin, 4 N. Y. 134. See Verplanck *v.* Wright, 23 Wend. 506, embracing in summary most of the above supposed covenants. See also 1 Smith, Lead. Cas. (5th Am. ed.) 177.

[4] Vyvyan *v.* Arthur, 1 B. & C. 410, 417; Aikin *v.* Alb. R. R., 26 Barb. 289; Vernon *v.* Smith, 5 B. & A. 11; Platt, Cov. 534.

[5] Spencer's Case, 5 Rep. 16; Platt, Cov. 473; Mayho *v.* Buckhurst, Cro. Jac. 438; Keppell *v.* Bailey, 2 Mylne & K. 517.

[6] Platt, Cov. 534; Co. Lit. 215 *b*.

[7] Platt, Cov. 586; Twynam *v.* Pickard, 2 B. & A. 105. The only differen

the reversion of such part cannot avail himself of a condition affecting the whole, since a condition cannot be apportioned.[1] But, to render one liable to covenant as assignee, he must take an assignment of the whole or of a part of the premises for the whole term.[2]

§ 677. **Assignment and Sub-lease distinguished.** — If a lessee transfers the whole or a part of the estate for a part of the time, it is a sub-lease, and not an assignment; and the original lessor has no right of action against the sub-lessee, who remains liable only to his lessor. If the whole or a part of the leased premises be transferred by the original lessee for the residue of the term, it is an assignment, though if it be in form a lease with the usual reservations the lessee or his assigns can treat it as such. Therefore, where a tenant for years underlet a part of the premises for the entire term, and then assigned to a third person all his interest in and to the original lease, it was held that his assignee might recover rent of the person to whom his assignor had let a part of the leased premises.[3]

§ 678. **Implied Covenants run with the Land.** — At the common law, an assignee of a reversion might have maintained an action of covenant for any of the implied covenants in a lease.[4] But neither at common law, nor by the statute of Henry VIII., could an assignee sue upon a breach of covenant which had happened before the assignment.[5]

§ 679. **Assignee of Lease becomes Tenant thereunder.** — Where the relation of landlord and tenant has become established, it attaches to all who take through or under the tenant as

between the first and second sections of the statute is, that the words in the first section apply to the assignee of the reversion, those in the second to the assignee of the term. Patten *v.* Deshon, 1 Gray, 325.

[1] Doe *v.* Lewis, 5 Ad. & E. 277 ; 1 Smith, Lead. Cas. (5th Am. ed.) 93.

[2] Holford *v.* Hatch, Doug. 183 ; Patten *v.* Deshon, 1 Gray, 325 ; Bagley *v.* Freeman, 1 Hilton, 196 ; Kain *v.* Hoxie, 2 Hilton, 311, 316 ; Bedford *v.* Terhune, 30 N. Y. 453, 460.

[3] Patten *v.* Deshon, 1 Gray, 325 ; McNiel *v.* Kendall, 128 Mass. 245 ; Astor *v.* Miller, 2 Paige, 68. In Fulton *v.* Stuart, 2 Ohio, 215, it is said that assignment of a part of the premises for the whole term is an underletting. But this is clearly an error. See Van Rensselaer *v.* Smith, 27 Barb. 104, 146.

[4] Platt, Cov. 532 ; also per *Bronson*, J., Willard *v.* Tillman, 2 Hill, 274.

[5] Lewes *v.* Ridge, Cro. Eliz. 863 ; 1 Smith, Lead. Cas. (5th Am. ed.) 172 ; Platt, Cov. 538 ; Gibbs *v.* Ross, 2 Head, 437.

assignee, as distinguished from sub-lessee, as above explained, whether immediate or remote.[1] An assignee of a lease is bound to know the contents of the lease itself,[2] and he at once becomes liable on all covenants that run with the land.[3] A recital in a lease that the premises are occupied and to be occupied as a lumber-yard is a covenant running with the land, and binds the assignee.[4] And even if the tenant convey in fee, the lessor may elect to treat the purchaser as entering as his tenant, or he may treat him as a disseisor.[5] But it may be remarked in passing, that the relation of landlord and tenant does not exist between the tenant of a mortgagor and the assignee of a mortgagee, although there is a kind of tenancy between mortgagor and mortgagee.[6]

§ 680. **When Assignees must be named to bind them.** — A distinction is drawn between covenants running with the land which bind assignees although not named, and those which require assignees to be named in the lease in order to charge them with performance; and this seems to depend upon whether or not the subject-matter of the covenant is *in esse* at the time of the demise or not. If it is, the covenant binds the assignee, whether named or not; if it is not, it does not bind him, unless expressly named therein. Thus if the covenant be to keep houses then on the premises in repair, it runs with the land, and binds the assignee, though not named. But if to build a new house on the demised premises, it will not bind assignees, unless named; though, as remarked by a writer, "the good sense of this is not very easily discoverable."[7] The rule as laid down by Lord Ellenborough upon the subject is this: "The assignee is specifically named, and

[1] Jackson *v.* Davis, 5 Cow. 123, 129; Benson *v.* Bolles, 8 Wend. 175; Overman *v.* Sanborn, 27 Vt. 54; Howland *v.* Coffin, 12 Pick. 125.

[2] Barroilhet *v.* Battelle, 7 Cal. 450.

[3] Consolidated Coal Co. *v.* Peers, 166 Ill. 361; s. c. 46 N. E. Rep. 1105; s. c. 38 L. R. A. 624.

[4] De Forest *v.* Byrne, 1 Hilton, 43.

[5] Jackson *v.* Davis, 5 Cow. 123, 130; Jaques *v.* Short, 20 Barb. 269.

[6] Jackson *v.* Rowland, 6 Wend. 666; Jackson *v.* Laughead, 2 John. 75.

[7] Spencer's Case, 5 Rep. 16; Platt, Cov. 466; id. 471; Hunt *v.* Danforth, 2 Curt. C. C. 604; Sampson *v.* Easterby, 9 B. & C. 505; Bream *v.* Dickerson, 2 Humph. 126. See also Masury *v.* Southworth, 9 Ohio St. 340; Hansen *v.* Meyer, 81 Ill. 321.

though it were for a thing not *in esse* at the time, yet, being specifically named, it would bind him, if it affected the nature, quality, or value of the thing demised independently of collateral circumstances, or if it affected the mode of enjoying it."[1] Nor would it be necessary to make use of the word "assigns," if the intent to bind them is inferrible from the language of the lease. In the case cited below, the court say, "We think the real question must be, the covenant being one which may be annexed to the estate, and run with the land, whether such was the intention of the parties as expressed in the deed." On the other hand, if the covenant be not of a nature that the law permits it to be attached to the estate, it cannot become so by the agreement of the parties.[2] Whether the covenant to surrender at the end of the term runs with the estate, so as to bind an assignee, unless expressly named in the lease, is treated by the court of Massachusetts as an undecided question, although it was held by Parke, B., that it did not run with the land.[3]

§ 681. **Divisibility of Covenants.** — Where a covenant which runs with the land is divisible in its nature, if the entire interest in different parts or parcels of the land passes by assignment to separate and distinct individuals, the covenant will attach upon each parcel *pro tanto*.[4] In such case the assignee of each part would be answerable for his proportion of any charge upon the land which is a common burden, and would be exclusively liable for the breach of any covenant which related to that part alone.[5]

§ 682. **Assignee's Liability depends on Privity of Estate.** — The liability of an assignee, however, during the time that the term remains vested in him, does not depend upon his ever having actually entered into possession of the premises, unless, perhaps, the assignment be by way of a mortgage, in respect to which different opinions have prevailed.[6] Differ-

[1] Congleton *v.* Pattison, 10 East, 138.

[2] Masury *v.* Southworth, 9 Ohio St. 340.

[3] Sargent *v.* Smith, 12 Gray, 426, 428; Doe *v.* Seaton, 2 Cr. M. & R. 730.

[4] Van Rensselaer *v.* Bradley, 3 Denio, 135; Van Rensselaer *v.* Jones, 2 Barb. 643; Gamon *v.* Vernon, 2 Lev. 231; Astor *v.* Miller, 2 Paige, 68; Van Horn *v.* Crain, 1 Paige, 455.

[5] Ibid.; Platt, Cov. 495.

[6] Wms. Real Prop. 331; Smith *v.* Brinker, 17 Mo. 148; Bagley *v.* Freeman,

ent courts have held differently upon the point whether the assignee of a lease is liable for rent before he shall have entered under his assignment. In Illinois, such assignee is liable before entry made. In New York, the converse is held; while in Massachusetts, although a term created by a lease under seal may, if the assignee enter upon the estate, be effectually transferred by a writing not under seal, an assignment to be effectual in rendering the assignee liable for the rent must either be made by deed, or completed by an entry or actual change of possession on the part of the assignee.[1] An executor of a lessee, though an assignee in law of the lease, does not become liable as such *de bonis propriis*, unless he actually enters into the demised premises.[2] He continues to be liable for breaches committed while he holds as assignee, though he should have subsequently assigned the lease.[3] Nor would he escape the liability of assignee by anything short of an assignment, and an actual transmission of possession If he retain possession of any part of the premises until the rent falls due, either by himself or his tenant, he is liable for the same.[4] But to render an assignee liable as such, he must have, by virtue of the assignment, actual possession or an immediate right to possession of the premises.[5] So the benefit of the covenants by the lessor with the lessee passes to the assignee of the latter by reason of such privity of estate.[6]

§ 683. **Lessee liable by Privity of Estate and Contract.** — From the twofold character of a lessee's liability, first, arising from privity of estate, secondly, from privity of contract on his ex-

1 Hilton, 196 ; Journeay *v.* Brackley, 1 Hilton, 447, 452 ; Felch *v.* Taylor, 13 Pick. 139. So the assignee remains liable, though he agreed when he took the assignment to reassign. Simonds *v.* Turner, 120 Mass. 329.

1 Babcock *v.* Scoville, 56 Ill. 461 ; Damainville *v.* Mann, 32 N. Y. 197 ; Sanders *v.* Partridge, 108 Mass. 556.

2 Wollaston *v.* Hakewell, 3 Mann. & G. 297, 320; Taylor, Land. & Ten. § 451.

3 Harley *v.* King, 2 C. M. & R. 18 ; Quackenboss *v.* Clarke, 12 Wend. 555-557 ; Journeay *v.* Brackley, 1 Hilton, 452 ; Donelson *v.* Polk, 64 Md. 501.

4 Negley *v.* Morgan, 46 Penn. St. 281 ; Sanders *v.* Partridge, 108 Mass. 556. But as assignee at law of the lessor he is liable *de bonis testatoris* to the end of the term, though he assigns over. Greenleaf *v.* Allen, 127 Mass. 248.

5 Hannen *v.* Ewalt, 18 Penn. St. 9 ; Thomas *v.* Connell, 5 Penn. St. 13 ; Wickersham *v.* Irwin, 14 Penn. St. 108.

6 Wms. Real Prop. 331.

press covenants, the effect of an assignment of his lease is that he ceases to be liable upon the implied covenants in his lease,[1] because the privity of estate is gone, but remains still liable upon his express covenants as if no assignment had been made, the original privity of contract still subsisting,[2] even though the lessor assent in writing to the assignment, and though he has actually received rent of the assignee,[3] unless the lessor shall have accepted a surrender from the lessee and released him.[4] If the lessor accept rent from the assignee, the lessee ceases to be liable in *debt* for the rent, for that liability results from a privity of estate.[5] But if the lessor refuses to accept the assignee as his tenant, he may continue to sue his lessee in debt for the rent.[6]

§ 684. **Act of Forfeiture by One of Several Assignees.** — If an act of forfeiture is committed by a breach of covenant, by one of several assignees, it is immaterial, so far as its effect in defeating the estate is concerned, whether it be done by one or all of the assignees.[7]

§ 685. **Lessee's Liability for Rent after Destruction of Premises.** — It is competent and usual for the parties to an indenture of

[1] Kunckle *v.* Wynick, 1 Dall. 305 ; Harley *v.* King, 2 C. M. & R. 18, Am. ed. note ; Kimpton *v.* Walker, 9 Vt. 191 ; Blair *v.* Rankin, 11 Mo. 440 ; Thursby *v.* Plant, 1 Saund. 241 *b* ; Waldo *v.* Hall, 14 Mass. 486; Swan *v.* Stransham, Dyer, 257 ; Donelson *v.* Polk, 64 Md. 501.

[2] Wall *v.* Hinds, 4 Gray, 256 ; Smith, Land. & Ten. 293 ; Thursby *v.* Plant, 1 Saund. 240, 241 *a*, note ; Ghegan *v.* Young, 23 Penn. St. 18 ; Walton *v.* Cronly, 14 Wend. 63 ; Williams *v.* Burrill, 1 C. B. 402, 433 ; Dewey *v.* Dupuy, 2 W. & S. 553 ; Howland *v.* Coffin, 12 Pick. 125 ; correcting and overruling the doctrine in Walker's Case, 3 Rep. 24, that, after accepting rent of the assignee of lessee, a lessor cannot sustain an action against the lessee. See also Journeay *v.* Brackley, 1 Hilton, 447, 451 ; 2 Platt, Leases, 352 ; Jones *v.* Parker, 163 Mass. 564 ; s. c. 40 N. E. Rep. 1044.

[3] Bailey *v.* Wells, 8 Wis. 141 ; Port *v.* Jackson, 17 Johns. 239 ; Quackenboss *v.* Clarke, 12 Wend. 556 ; Damb *v.* Hoffman, 3 E. D. Smith, 361 ; *ante*, § 671.

[4] Frank *v.* Maguire, 42 Penn. St. 77 ; Barnes *v.* Northern Trust Co., 169 Ill. 112 ; s. c. 48 N. E. Rep. 31 ; Whitcomb *v.* Cummings, 68 N. H. 67 ; s. c. 38 Atl. Rep. 503.

[5] Fletcher *v.* M'Farlane, 12 Mass. 43 ; Auriol *v.* Mills, 4 T. R. 94, 98 ; Wall *v.* Hinds, 4 Gray, 256 ; Pine *v.* Leicester, Hobart, 37 *a*, Wms. notes ; Thursby *v.* Plant, 1 Saund. 240 ; Com. Land. & Ten. 275.

[6] Auriol *v.* Mills, 4 T. R. 94 ; Thursby *v.* Plant, 1 Saund. 241 *b*, note ; Coghil *v.* Freelove, 3 Mod. 325 ; Hobart, 37 *a*, note.

[7] Clarke *v.* Cummings, 5 Barb. 339.

lease, instead of leaving their rights and duties in respect to the leased premises to be determined by the rules of law, however well defined, to insert express limitations or covenants affecting these common law rights, especially in regard to the mode of using the premises, and the consequences of fault or accident connected with such use. Though these are more fully treated of hereafter,[1] it may be remarked that if no such limitation is inserted, the lessee will be bound by his covenant to pay rent, although the premises be destroyed or rendered untenantable from other causes.[2] The court cannot interpolate what the contract, as written, does not contain. Thus, in the lease of a water-power, provision was made for abating the rent, in case of loss of power in proportion to the deficiency of the power: the court could adopt no other remedy for the party injured by such loss.[3] So where lessee covenanted to pay rent during the term, but the lessor had agreed, orally, that if the building were burned the rent should cease, the court excluded this evidence, as it expressly contradicted what the tenant had covenanted to do.[4] Though the common law of New York coincides with the doctrine above stated, rendering the lessee liable for rent though the premises may have been destroyed; by a statute of that State, where the premises have become untenantable by the force of the elements, without the fault of the tenant, he is not bound to repair them, and is at liberty to surrender and abandon them.[5] [There are similar statutes in Connecticut, Mississippi, Minnesota, New Jersey, and other States.[6]]

§ 686. **Liability for Repairs.** — But neither the lessor, nor

[1] *Post*, § 721 *et seq.*

[2] Fowler *v.* Bott, 6 Mass. 63; Bigelow *v.* Collamore, 5 Cush. 226; Beach *v.* Farish, 4 Cal. 339; Leavitt *v.* Fletcher, 10 Allen, 119, 121.

[3] Sheets *v.* Selden, 7 Wall. 416.

[4] Martin *v.* Berens, 67 Penn. St. 459.

[5] Graves *v.* Berdan, 26 N. Y. 498; Taylor, Land. & Ten. § 520; Suydam *v.* Jackson, 54 N. Y. 450. But the tenant, to avail himself of this statute, must entirely surrender the premises. Johnson *v.* Oppenheim, 55 N. Y. 280.

[6] In Connecticut, the tenant is relieved from paying rent without the necessity of surrendering. Gen. Stat. § 2969; Gulliver *v.* Fowler, 64 Conn. 556; s. c. 30 Atl. Rep. 852. In Mississippi there may be an apportionment of rent upon partial destruction. Code, § 2498; Taylor *v.* Hart, 73 Miss. 22; s. c. 18 So. Rep. 546; s. c. 30 L. R. A. 716.

the lessee, if he uses the premises in a husbandlike manner, will be bound to rebuild or repair the premises, if destroyed or damaged without his fault, in the absence of an express covenant to that effect in the lease;[1] though it is competent for the lessor or the lessee to covenant to repair or rebuild, either absolutely or to a limited extent.[2] If the lessee covenants to repair and restore the premises or to surrender them in good condition, or in terms to that effect, he will be bound to make good his covenant, and rebuild the premises if destroyed, and in the meantime to pay his rent, though the loss may have happened without his fault, and even if caused by storm, flood, fire, inevitable accident, or the act of a stranger, by the wind, or by lightning.[3] Even where a thing becomes impossible of performance by the act of a third person, or the act of God, its impossibility affords no excuse for its nonperformance. It is the party's folly that led him to make such a bargain without providing against the possible contingency.[4] If, by the terms of the lease, the covenant to pay

[1] Post *v.* Vetter, 2 E. D. Smith, 248; Welles *v.* Castles, 3 Gray, 323; 2 Platt, Leases, 182; Horsefall *v.* Mather, Holt, N. P. 7; Leavitt *v.* Fletcher, 10 Allen, 121; Elliot *v.* Aiken, 45 N. H. 30, 36; Reeves *v.* McComeskey, 168 Penn. St. 571; s. c. 32 Atl. Rep. 96; Hanley *v.* Banks, 6 Okla. 79; s. c. 51 Pac. Rep. 664. Nor can a covenant to repair be engrafted on a written lease by parol evidence. Gulliver *v.* Fowler, 64 Conn. 556; s. c. 30 Atl. Rep. 852. But a parol contract made subsequent to the written lease is binding. Woodworth *v.* Thompson, 44 Neb. 311; s. c. 62 N. W. Rep. 450. Unless the promise be without consideration. Libbey *v.* Tolford, 48 Me. 316.

[2] Walton *v.* Waterhouse, 2 Wms. Saund. 422, n. 2; Phillips *v.* Stevens, 16 Mass. 238.

[3] 2 Wms. Saund. 422, n. 2; Abby *v.* Billups, 35 Miss. 618; Bigelow *v.* Collamore, *supra;* Shep. Touch. 173; Flynn *v.* Trask, 11 Allen, 550; Hoy *v.* Holt, 91 Penn. St. 88; *post*, § 721 *et seq.*

[4] Paradine *v.* Jane, Aleyn, 27; Hickman *v.* Rayl, 55 Ind. 551. So Hills *v.* Thompson, 13 M. & W. 487, where the lessee was held to his covenant to raise a certain quantity of coal from the demised premises, though there was not that quantity there, because this was in effect warranted as a payment of rent. But in Clifford *v.* Watts, L. R. 5 C. P. 577, lessee's agreement to dig not less than 1,000 tons of clay was held excused, as there was not so much in the land leased to him. And it seems that, in like manner, as the absolute non-existence of the subject-matter of the covenant will excuse performance, unless there is an express warranty of the possibility of performance, so will the absolute destruction of the thing demised, as in case of the lease of single rooms in a building. Shawmut Bk. *v.* Boston, 118 Mass. 125. In the ordinary case of destruction of premises, the land remains. Rolle, Abr. 236.

rent is partially or wholly suspended when the premises are partially or wholly destroyed by unavoidable casualty, or words of similar import, this does not apply to a gradual decay of the premises, but is limited to damage arising from uncontrollable force and accident.[1]

§ 687. **Inconsistent Covenants.** — From using blank forms in making leases, it sometimes happens that printed and written clauses in the same lease are inconsistent with each other; and the rule in such case is, to regard the written clause as the contract of the parties, because the printed may have been left standing by inadvertence.[2]

[1] Hateh *v.* Stamper, 42 Conn. 28; Phillips *v.* Sun Dye Co., 10 R. I. 458. But such deterioration as is the result of the casualty is within the purview of this stipulation. Cary *v.* Whiting, 118 Mass. 363. And upon such termination the lessee may recover back proportionately rent paid in advance. Rich *v.* Smith, 121 Mass. 328.

[2] Ball *v.* Wyeth, 8 Allen, 275, 278.

CHAPTER XXIII.

ESTATES FOR YEARS — OF ASSIGNMENT AND SUB-TENANCY.

§ 688. Power to assign and sublet.
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§ 688. **Power to assign and sublet.** — The proposition is generally, if not universally true, that unless there is some restriction by covenant or condition in the lease, a tenant may assign the lease,[1] or sublet the premises.[2] During the continuance of the term, the original lessor's rights to possession are so far gone, that, if he were to find the premises vacant, he would have no more right to enter than a stranger.[3]

[1] Robinson *v.* Perry, 21 Ga. 183.

[2] King *v.* Aldborough, 1 East, 597; Taylor, Land. & Ten. 22; Crommelin *v.* Thiess, 31 Ala. 412, 421. But in Georgia, a tenant is prohibited by statute from sub-letting premises without consent of his landlord. McBurney *v.* McIntire, 38 Ga. 261.

[3] Nave *v.* Berry, 22 Ala. 382; Brown *v.* Kite, 2 Overt. 233; Brown *v.* Powell, 25 Penn. St. 229; Shannon *v.* Burr, 1 Hilton, 39; Crommelin *v.* Theiss, 31 Ala. 412; Wms. Real Prop. 335, 336.

§ 689. **Assignment must be in Writing.** — The statute of frauds requires the assignment to be by deed or note in writing, signed by the party assigning the same, or his agents thereunto lawfully authorized in writing.[1] Statute 29 Car. II. c. 3, § 3. And now by the statute of Victoria it can only be done by deed.[2] The statute 32 Henry VIII. c. 34, as to assignment of covenants, etc., in leases, applies only to cases of demise by deed. Consequently, the assignee of such a reversion cannot sue in assumpsit on the contract made by the assignor. And the very definition of a covenant implies that the agreement constituting it should be under seal.[3]

§ 690. **What amounts to Assignment.** — It may be stated, in general terms, that the grant by a lessee of his entire estate will be an assignment of the lease, whether done in the form of a lease, or by an instrument in terms an assignment.[4] So a conveyance in fee by a lessee for years in the form of a deed will operate as an assignment, and hold his grantee as tenant of the first lessor; nor could the grantee set up his possession as adverse to that of such lessor.[5] If a lessor during the term mortgage the premises, it may operate as an assignment of the reversion *pro tanto*, and carry with it the rent as incident to it; and all that would be necessary in such a case for the mortgagee to avail himself of the rent would be to notify the tenant

[1] Bedford *v.* Terhune, 30 N. Y. 453, 459.

[2] Wms. Real Prop. 133.

[3] Standen *v.* Chrismas, 10 Q. B. 135; Platt, Cov. 3. But the same rights may enure in favor of the reversioner on an oral or written demise where there has been an attornment or adoption of the transfer by payment of rent or the like, and assumpsit will lie. Rennie *v.* Robinson, 1 Bing. 147; Buckworth *v.* Simpson, 1 Cr. M. & R. 834; Cornish *v.* Stubbs, L. R. 5 C. P. 334; Smith *v.* Eggington, L. R. 9 C. P. 145. Especially where the attornment is dispensed with by the statute of Anne or the same rule obtains at common law. Perrin *v.* Lepper, 34 Mich. 292. And see Shine *v.* Dillon, 1 Ir. R. C. L. 277. In Allcock *v.* Moorhouse, 9 Q. B. Div. 366, recovery by the assignee of a lessor from year to year was denied, for want of privity of estate, in an action of use and occupation against the lessee, who had assigned though without the lessor's assent, and the statute of 4 Anne, c. 16, § 9, held not to apply.

[4] 2 Prest. Conv. 124. See Palmer *v.* Edwards, Doug. 187, n.; Poultney *v.* Holmes, 1 Str. 405; Lynde *v.* Hough, 27 Barb. 415; Beardman *v.* Wilson, L. R. 4 C. P. 57; or by will, Martin *v.* Tobin, 123 Mass. 85; Sanders *v.* Partridge, 108 Mass. 556, 558.

[5] Sands *v.* Hughes, 53 N. Y. 287, 293.

to pay it to him.[1] But if the mortgage of the premises be antecedent to the lease, it is not enough for the mortgagee, in order to claim the rent, to give the tenant notice to pay it. He must gain possession of the mortgaged premises before he can compel the tenant to pay him the rent.[2] And the reason of this is, that the lessee of the mortgagor has his rights as assignee, and the mortgagor would not himself be liable to the mortgagee for rent until the latter should have taken possession of the premises under his mortgage. But while this is true, it is not true that by accepting rent the mortgagee affirms the lease for the whole term. It would only create a tenancy from year to year at the farthest.[3] But an assignment by a lessor in writing of a lease which is under seal is not a transfer of the legal title to the lease so as to enable the assignee to sue thereon for the rent reserved. The assignment to be effectual must be under seal.[4] But an assignment by a lessee, in writing, of a lease under seal, would so far be effectual, that, if followed by an entry on the part of the assignee upon the leased premises, he would be liable as assignee for rent accruing due during his tenancy by reason of the privity of estate thereby created between him and the reversioner.[5]

§ 691. **When Assignment presumed.** — In an action by a lessor against one in possession of leased premises to recover rent, the latter will be presumed to be the assignee of the lessee unless the contrary is shown.[6] And a surrender made by the lessee to the lessor and accepted by him during the period of an occupancy by one in possession, will be conclusive evidence that the lessee and not the occupant is the one who holds under the lessor. By this, as well as other evidence, the presumption of an assignment may be rebutted, as well as that of such a privity of estate as makes a tenant responsible to the lessor for rent.[7]

[1] Kimball *v.* Lockwood, 6 R. I. 138 ; Russell *v.* Allen, 2 Allen, 42.

[2] Evans *v.* Elliott, 9 Ad. & E. 342 ; Baldwin *v.* Walker, 21 Conn. 168.

[3] Gartside *v.* Outley, 58 Ill. 210.

[4] Bridgham *v.* Tileston, 5 Allen, 371 ; Brewer *v.* Dyer, 7 Cush. 337 ; Wood *v.* Partridge, 11 Mass. 488.

[5] Sanders *v.* Partridge, 108 Mass. 556.

[6] Cross *v.* Upson, 17 Wis. 618 ; Mariner *v.* Crocker, 18 Wis. 251 ; Bedford *v.* Terhune, 30 N. Y. 453.

[7] Durando *v.* Wyman, 2 Sandf. 597 ; Quackenboss *v.* Clarke, 12 Wend. 555 ; Kain *v.* Hoxie, 2 Hilton, 311.

§ 692. **Difference between Assignment and Sublease.** — Whether an act of the lessee is an assignment or an underletting depends upon whether he has thereby parted with his entire interest in the term as a term. If he has aliened his entire interest, it is an assignment. If it is for a period which is to expire before the expiration of the original lease, it is a subletting. In the one case he has a reversion left, in the other he has none. And the retaining the smallest reversionary interest gives to the instrument the mere effect of an underlease.[1] Giving it, however, the form of an underletting, does not change its character. If it be for the whole term, it will be an assignment with all its consequences.[2] So if a lessee underlet a portion of the leased premises for a term as long or longer than his own, such underlessee becomes thereby assignee, and liable, proportionably, for the performance of the covenants which relate to the estate. Nor would it make any difference in this respect, though the premises be underlet for a larger rent than that reserved in the original lease. The undertenant would be liable to his lessor, under his lease, for such excess.[3] But though it would be an underletting unless the lessee's whole estate and interest passes, if it be the lessee's whole estate and interest in a part of the leased premises, it will as to that part be an assignment, and the tenant will be liable as assignee for a proportionate part of the rent reserved in the original lease.[4] A judicial sale of the interest of the lessee creates in the purchaser the obligation of an assignee to pay the rent sub-

[1] Burton, Real Prop. § 889; 2 Prest. Conv. 124; Parmenter *v.* Webber, 8 Taunt. 593; Pollock *v.* Stacy, 9 Q. B. 1033, where the form was an underletting; Patten *v.* Deshon, 1 Gray, 325, where the underletting was of a part of the premises for the entire term; 1 Platt, Leases, 102; 2 id. 420; Derby *v.* Taylor, 1 East, 502, Bacon, Abr. Lease, I. 3; Bagley *v.* Freeman, 1 Hilton, 196, 198; Kain *v.* Hoxie, 2 Hilton, 311.

[2] Sanders *v.* Partridge, 108 Mass. 556; Beardman *v.* Wilson, L. R. 4 C. B. 57; Wollaston *v.* Hakewell, 3 Mann. & G. 297, 323; Taylor, Land. & Ten. (8th ed.) § 16 and note; Firth *v.* Rowe, 53 N. J. Eq. 520; s. c. 32 Atl. Rep. 1064.

[3] Wollaston *v.* Hakewell, *supra*; Smith *v.* Mapleback, 1 T. R. 441; Taylor, Land. & Ten. (8th ed.) § 16 and note; Cook *v.* Jones, 96 Ky. 283; s. c. 28 S. W. Rep. 960.

[4] 2 Platt, Leases, 421; Pingrey *v.* Watkins, 15 Vt. 479, 488. See Holford *v.* Hatch, Doug. 174.

sequently accruing.[1] The cases upon the point, whether a subletting by a lessee of his entire term amounts to an assignment, or creates a new relation of landlord and tenant, with a right to distrain for rent and the like between him and the undertenant, are numerous, and it is not proposed to examine them any further than as it affects the question, whether such subletting, in terms, creates a privity of estate between the sublessee and the original lessor. And here unfortunately the law seems to be unsettled, no case having been found expressly in point.

§ 693. **The English Rule.** — In England the rule seems established that unless the sublease is less in point of time than the original term, it is an assignment. Thus it is laid down by Preston that a right of entry or a reservation of rent will not change the nature of the estate, but that to make it an underlease a reversion must be retained by the former owner, and that the underlease must be for a period less in point of time than the term or estate of the lessee, and a day, an hour, or a minute will be sufficient.[2] The language of Bacon is, "When the whole term is made over by the lessee, although in the deed by which that is done the rent and power of entry for non-payment are reserved to him and not to the original lessee (lessor), this is an assignment and not an underlease, and therefore the original lessor or his assignee of the reversion may sue or be sued on the respective covenants in the original lease, and this although new covenants are introduced in assignment."[3]

§ 694. **The American Rule.** — But in the United States a different rule seems to have prevailed. Thus where the lessee demised to another the leased premises for the residue of the term, but reserved a delivery of possession on the last day of the term, and a right to possession if the buildings were leased during the term, it was held to be an underletting and

[1] D'Aquin *v.* Armant, 14 La. Ann. 217; and see McNeil *v.* Kendall, 128 Mass. 245.

[2] 2 Prest. Conv. 124, 125, citing Palmer *v.* Edwards, Dougl. 187, n.

[3] Bacon, Abr. Lease, I. 3; Doe *v.* Bateman, 2 B. & A. 168; Pluck *v.* Digges, 5 Bligh, N. S. 31, 65; Parmenter *v.* Webber, 8 Taunt. 293; King *v.* Wilson, 5 Mann. & R. 157, n.; Langford *v.* Selmes, 3 Kay & J. 226, 229; Beardman *v.* Wilson, L. R. 4 C. P. 57.

not an assignment. So where the assignee of a lease demised his entire interest, reserving a rent larger than that reserved in the original lease with a right of entry for the non-payment thereof, it was held to be an underlease and not an assignment.[1] So in a case in the Supreme Court of New York, where the lessee underlet for the entire term, but took a covenant from the sublessee to surrender up possession to him *at the expiration of the term*, and a right of re-entry was reserved in case the rent was not paid, it was held a subletting and not an assignment.[2] It is obvious that the original lessee intended to reserve an interest in and a control over the premises; and the court held that the original lessor could not avail himself of a covenant by the sublessee to the mesne lessor in respect to taxes. In Massachusetts, in a leading case,[3] the lessee's assignee, after a demise by the lessee for his entire term, was allowed to recover rent from the person to whom the demise was made, as if the latter were clearly a sublessee, though the point under consideration was not adverted to, nor does it appear whether re-entry by and redelivery to the mesne lessor were stipulated for in the demise. This decision, however, has been relied on as an authority in later cases, which place the law in this State on the same ground as that occupied by the latest decisions in New York.[4] Similar decisions have also been made in California[5] and Iowa,[6] while in Pennsylvania the English doctrine is adopted that a termor for years who demises the estate to another for the same or a greater term than that for which he holds under his own demise, is considered thereby *ipso facto*, to *assign* his

[1] Kearney *v.* Post, 1 Sandf. 105.

[2] Martin *v.* O'Connor, 43 Barb. 514; Collins *v.* Hasbrouck, 56 N. Y. 157; Ganson *v.* Tifft, 71 N. Y. 48. But see Woodhull *v.* Rosenthal, 61 N. Y. 382; Sanders *v.* Partridge, 108 Mass. 556.

[3] Patten *v.* Deshon, 1 Gray, 325. So in Shumway *v.* Collins, 6 Gray, 227.

[4] McNiel *v.* Kendall, 128 Mass. 215; Dunlap *v.* Bullard, 131 Mass. 161. See also Prescott *v.* Kyle, 103 Mass. 381. It is somewhat difficult to apprehend the ground of the first-named case, which professes to rest on Patten *v.* Deshon, but puts the decision on the singular ground that because the parcel transferred by the lease had certain easements in the parcel retained by the lessor, this gave the latter reversionary rights as to the former.

[5] Blumenberg *v.* Myres, 32 Cal. 93.

[6] Collamer *v.* Kelly, 12 Iowa, 319.

term, and his lessee, so far as the original lessor is concerned, holds as assignee of such term, and not as a subtenant. And the same doctrine seems to apply whether the original demise was by parol or in writing.[1]

§ 695. **Liability of Assignee for Prior Breaches.** — The assignee of a lease is not liable for breaches of covenant arising prior to the assignment,[2] unless the performance of such covenant shall have been secured by a mortgage in the lease, of something to be put upon the premises by the lessee, in which case the assignee would hold the premises subject to the lessor's right as mortgagee for such prior breach.[3]

§ 696. **Tenancy at Will not assignable.** — Strictly speaking, a tenant at will has no estate which he can assign so as to create privity of estate between the original lessor and the tenant to whom he gives possession. The lessor may treat such assignee as a disseisor. See *post*, § 765.

§ 697. **No Privity between Lessor and Sublessee.** — The respective rights of the original lessor and the tenant of a lessee, regarded as sublessee, are well settled. There is no privity of estate between them, and therefore the lessor cannot sue the undertenant upon the lessee's covenant to pay rent, nor recover rent of him in any form of action.[4] The following case will serve to illustrate the above proposition, and suggests another point of much difficulty, how far a mortgagee of a lessee is regarded, in law, as an assignee with corresponding liabilities as such. A made a deed to J S with a condition indorsed, that it should become void if the grantor paid a certain sum by a certain time, "together with the use of the farm." This sum was orally fixed by agreement to be paid annually. A continued to occupy the farm, and made a mortgage to the defendant of the same, still retaining possession. The agreed "use" or rent being in arrear, J S

[1] Lloyd *v.* Cozens, 2 Ashm. 131, 137; Holford *v.* Hatch, Doug. 187. See also Palmer *v.* Edwards, Doug. 187, note.

[2] Day *v.* Swackhamer, 2 Hilton, 4.

[3] Barroilhet *v.* Battelle, 7 Cal. 450.

[4] McFarlan *v.* Watson, 3 N. Y. 286; Dartmouth Coll. *v.* Clough, 8 N. H. 22; Campbell *v.* Stetson, 2 Met. 504; Wms. Real. Prop. 336; Jennings *v.* Alexander, 1 Hilton, 154; Holford *v.* Hatch, Doug. 187; Grundin *v.* Carter, 99 Mass. 15.

sued the defendant for the same as assignee of A, the lessee and mortgagor. But it was held, that, as the defendant never was in possession of the premises, no action lay against him in favor of J S. But the court do not decide whether, if this transaction had been clearly a lease between the original parties, instead of a mortgage of real estate, and to be treated accordingly, the defendant, as mortgagee of the leasehold interest, would be liable for rent as assignee of the lessee.[1] But if one enters and holds possession of premises as assignee of the lessee, he will be liable for the rent so long as he continues to hold it.[2] Unless, however, the tenant holding under a lessee can be charged as assignee, he is no more liable in equity than at law to the original lessor,[3] even though the occupation by the tenant be without permission or objection of any one.[4] But in one case it was held, that where, by the terms of the original lease, the lessor had a right to enter for non-payment of rent, an undertenant might pay his rent to the original lessor in order to protect his estate.[5]

§ 698. **Lessor may assign Reversion.** — Corresponding to the right of lessee to assign or underlet his interest is the right which the lessor has to convey or assign his reversion, and thereby bring in a new party with the rights of a reversioner.[6] Nor is it necessary, now, that the tenant should attorn to such grantee or assignee, to give effect to the grant or assignment, in those States where the 4 Anne, c. 16, § 9, is adopted,[7]

[1] Graham *v.* Way, 38 Vt. 19; *post*, § 707.

[2] Davis *v.* Morris, 36 N. Y. 569, 576.

[3] Bedford *v.* Terhune, 30 N. Y. 453; Davis *v.* Morris, 36 N. Y. 574.

[4] Kain *v.* Hoxie, 2 Hilton, 311, 316.

[5] Peck *v.* Ingersoll, 7 N. Y. 528. See also Collins *v.* Whilldin, 3 Phila. 102.

[6] Callaghan *v.* Hawkes, 121 Mass. 299. Here it was held that an agreement in a lease that the landlord might sell the leased premises, first giving the tenant notice, meant that he might by such sale terminate the lease, as he had the right to transfer the reversion without such notice.

[7] Wms. Real Prop. 203; 5 B. & C. 512, note, Am. ed.; New York, Moffat *v.* Smith, 4 N. Y. 126; New Hampshire, Mussey *v.* Holt, 24 N. H. 248; Maryland, Funk *v.* Kincaid, 5 Md. 404; New Jersey, 1 Gen. Stat. 1895, p. 880; Missouri, Rev. Stat. 1899, § 4125; Connecticut, Baldwin *v.* Walker, 21 Conn. 168; Alabama, English *v.* Key, 39 Ala. 113; Pennsylvania, 3 Binn. 625; Tilford *v.* Fleming, 64 Penn. St. 300. In Maine it is doubted. Fox *v.* Corey, 41 Me. 81. The statute of Anne is not in force in Illinois. Fisher *v.* Deering, 60 Ill. 114.

or its principle existed independently at law.[1] So if the estate of the lessor as owner in fee is sold on execution before the rent is due, it would carry the right to recover the rent to the purchaser.[2]

§ 699. **Reversion carries Rent in whole or in part.** — As a general proposition, having few exceptions, the transfer of a reversion carries with it the rent due and accruing thereafter, by the lease creating the term for years,[3] whether the assignment of the reversion be by deed or mortgage.[4] This right of a lessor to recover rent of the assignee of the lessee is founded not on contract, but on privity of estate, and after he has parted with his reversion he cannot recover the rent.[5] And it seems to be of little consequence how one becomes a reversioner as to the assignee of the lessee so far as it concerns his right to recover rent of whoever is assignee and tenant when the rent falls due. Thus, after a lease for five years, a second lease for ten years, including the period of the first, transfers the right to the rent of the first.[6] But the assignee cannot recover rent then due and in arrears. Thus where rent was reserved generally in a lease, and the lessor died, only the rent accruing afterwards belonged to and was recoverable by his heirs as being his reversioners.[7] And if the administrator collect it, he will hold it in trust for the heirs at law and the widow.[8] The same rule applies if the intes-

[1] Massachusetts, Farley *v.* Thompson, 15 Mass. 18; Keay *v.* Goodwin, 16 Mass. 1; Michigan, Perrin *v.* Lepper, 34 Mich. 292.

[2] Shelton *v.* Codman, 3 Cush. 318; Hart *v.* Israel, 2 P. A. Browne, 22; Bk. of Penn. *v.* Wise, 3 Watts, 394; Scheerer *v.* Stanley, 2 Rawle, 276.

[3] Burden *v.* Thayer, 3 Met. 76; Keay *v.* Goodwin, 16 Mass. 1; Newall *v.* Wright, 3 Mass. 138; Johnston *v.* Smith, 3 Penn. 496; York *v.* Jones, 2 N. H. 454; Farley *v.* Craig, 11 N. J. 262; Scott *v.* Lunt, 7 Pet. 596; Van Rensselaer *v.* Gallup, 5 Denio, 454; Wilson *v.* Delaplaine, 3 Harringt. 499; Stout *v.* Keene, id. 82; Snyder *v.* Riley, 1 Speers, 272; Gibbs *v.* Ross, 2 Head, 437. Although the transfer be by way of mortgage, Russell *v.* Allen, 2 Allen, 42. For the effect of a mortgage of his estate by a reversioner and the rights of mortgagees, generally, to rents of leased premises mortgaged before and after leases made, the reader is referred to § 1068 *et seq.* Gale *v.* Edwards, 52 Me. 363.

[4] Kimball *v.* Pike, 18 N. H. 419.

[5] Grundin *v.* Carter, 99 Mass. 15.

[6] Harmon *v.* Flanagan, 123 Mass. 288.

[7] Jaques *v.* Gould, 4 Cush. 384.

[8] Robb's Appeal, 41 Penn. St. 45; Drinkwater *v.* Drinkwater, 4 Mass. 353, 358; Mills *v.* Merryman, 49 Me. 65; King *v.* Anderson, 20 Ind. 385.

tate die insolvent. The heirs are entitled to the rents until the estate is sold by the administrator by leave of court for the payment of debts.[1] And the same principle applies, though the rent be payable in a share of the grain raised upon the premises.[2]

§ 700. **Apportionment of Rent.** — If a part only of the reversion is conveyed, the grantee or assignee may recover his share of the rent *pro rata* according to the relative values of the respective parts of the reversion;[3] and this doctrine of apportionment of the right to rent among the several assignees of the reversion applies where this reversion has descended to several heirs;[4] and one of several heirs-at-law can sue for his aliquot part of rent accruing due after the death of his ancestor, the lessor;[5] or where a part of the reversion is levied upon by execution for debt, or is set off to a widow for her dower.[6] This apportionment of rent is never made in reference to the length of time of occupation; but whoever owns the reversion at the time the rent falls due is entitled to the entire sum then due.[7] But where by agreement the tenant was to pay so much rent and taxes by the year, and if he occupied for a longer time he was to pay *pro rata* for such time, it was held to include a *pro rata* of the taxes for the year as well as of the rent.[8] The rent, in such cases, accrues to the holder of the reversion by reason of his privity of estate with the lessor, and not as the assignee of a chose in action; and when a lessor has once parted with his reversion, he cannot, except as hereafter stated, maintain any action for subsequently accruing rent against his lessee.[9] The right to

[1] Gibson *v.* Farley, 16 Mass. 280; Newcomb *v.* Stebbins, 9 Met. 540, 544.

[2] Burns *v.* Cooper, 31 Penn. St. 426; Cobel *v.* Cobel, 8 Penn. St. 342.

[3] Montague *v.* Gay, 17 Mass. 439; Nellis *v.* Lathrop, 22 Wend. 121; Reed *v.* Ward, 22 Penn. St. 144; Bank of Pennsylvania *v.* Wise, 3 Watts, 394.

[4] Reed *v.* Ward, 22 Penn. St. 144; Bk. of Penn. *v.* Wise, 3 Watts, 394; Crosby *v.* Loop, 13 Ill. 625; Clun's Case, 10 Rep. 128; Cole *v.* Patterson, 25 Wend. 456; Com. Land. & Ten. 422.

[5] Jones *v.* Felch, 3 Bosw. 63.

[6] 1 Rolle's Abr. 237, pl. 4, 5.

[7] Martin *v.* Martin, 7 Md. 368; Burden *v.* Thayer, 3 Met. 76; Bk. of Penn. *v.* Wise, 3 Watts, 394.

[8] May *v.* Rice, 108 Mass. 150.

[9] Peck *v.* Northrop, 17 Conn. 217; Breeding *v.* Taylor, 13 B. Mon. 477; Sampson *v.* Grimes, 7 Blackf. 176; Van Wicklen *v.* Paulson, 14 Barb. 654; Walker's Case, 3 Rep. 23; Grundin *v.* Carter, 99 Mass. 15.

rent, *pro rata*, passes at once, and the law comes in to apportion it in reference to that time, so that nothing done, subsequently, by either of the original parties, can affect the rights of the others.[1] And where rent is reserved generally, without naming to whom, the law comes in and appropriates it to whoever is entitled to the estate, including the heirs of the lessor.[2]

§ 701. **Rent and Reversion separable.** — The rent and reversion may be separated by the holder of the same. Thus where a reversioner conveyed his entire estate, including his reversion, and reserved the rent to himself.[3] So where the demise is by indenture, and the lessee covenants to pay rent, the lessor may assign or devise the rent without granting the reversion, and such assignee may recover the subsequently accruing rent in his own name, in an action of debt.[4] But the rent cannot be apportioned by the landlord to different persons without the tenant's assent,[5] though with such assent it may be.[6] So a lessor may devise part of a rent, which will be good without attornment of the tenant, and the part so devised will thereby be severed from the reversion.[7]

§ 702. **Assignee of Rent sues in his own Name.** — In these cases, where by an assignment of the reversion the rent passes, or where there is an assignment of the rent without the reversion, the assignee sues in his own name for any rent accruing due after such assignment. "It [the rent] is not a thing in action, but *quasi* an inheritance."[8] Thus where les-

[1] Linton *v.* Hart, 25 Penn. St. 193.

[2] Whitlock's Case, 8 Rep. 71; Cother *v.* Merrick, Hardres, 95; Jaques *v.* Gould, 4 Cush. 384.

[3] M'Murphy *v.* Minot, 4 N. H. 251; Co. Lit. 47 *a*; Crosby *v.* Loop, 13 Ill. 625; Van Rensselaer *v.* Hays, 19 N. Y. 68; Dixon *v.* Niccolls, 39 Ill. 372.

[4] Ryerson *v.* Quackenbush, 26 N. J. 236; Demarest *v.* Willard, 8 Cow. 206; Patton *v.* Deshon, 1 Gray, 325; Childs *v.* Clark, 3 Barb. Ch. 52; Kendall *v.* Carland, 5 Cush. 74; Allen *v.* Bryan, 5 B. & C. 512; Robins *v.* Cox, 1 Lev. 22; Moffat *v.* Smith, 4 N. Y. 126; Willard *v.* Tillman, 2 Hill, 274; s. c. 19 Wend. 358; Buskin *v.* Edmunds, Cro. Eliz. 636; Kelly *v.* Bowerman, 113 Mich. 446; s. c. 71 N. W. Rep. 836. See *post*, § 1200.

[5] Ards *v.* Watkin, Cro. Eliz. 637; Ryerson *v.* Quackenbush, 26 N. J. 236.

[6] Ryerson *v.* Quackenbush, *supra*.

[7] Ards *v.* Watkin, *supra*.

[8] Ards *v.* Watkin, *supra*; Demarest *v.* Willard, 8 Cow. 206; Ryerson *v.* Quackenbush, *supra*; Childs *v.* Clark, 3 Barb. Ch. 52; Willard *v.* Tillman, 2 Hill, 274;

sor for life reserving rent devised the rent to another for life, who died between the periods of payment of the rent, the executors of such devisee were held entitled only to the rent due at the period of payment next prior to his death.[1]

§ 703. **Action for Rent by Heirs of the Reversioner.** — Where a rent descends with a reversion to several heirs, in an action to recover it, they may, and it is very questionable if they must not, all join.[2]

§ 704. **Actions by Assignees against Assignees.** — The assignee of the reversion, in the above supposed cases, might sue the assignee of the lessee as well as the lessee himself, if in possession of the premises, because of a privity of estate, and because the covenant to pay rent runs with the land.[3]

§ 705. **Form of Action by or against Assignees.** — In respect to the form of the action to be adopted by or against assignees in respect to covenants in leases, so much depends upon the circumstances under which the action may be brought, as well as upon the statutes of the several States, that it only seems necessary to say here, that an action of debt or covenant would lie for rent against the assignee of a lessee at common law, and would be local, the rule of the common law being, that an action founded on a privity of estate which relates to land is local, while one founded on privity of contract is transitory.[4]

§ 706. **Notice of Assignment necessary.** — It is important that the assignee of a reversion or of rent should give notice thereof to the lessee or tenant. Otherwise a payment of rent

Crosby *v.* Loop, 13 Ill. 625; Abercrombie *v.* Redpath, 1 Iowa, 111; Van Rensselaer *v.* Hays, 19 N. Y. 68, 99; Allen *v.* Bryan, 5 B. & C. 512; Dixon *v.* Niccolls, 39 Ill. 372, 384; Pfaff *v.* Golden, 126 Mass. 402.

[1] Stillwell *v.* Doughty, 3 Bradf. 359.

[2] Porter *v.* Bleiler, 17 Barb. 149; Martin *v.* Crompe, 1 Ld. Raym. 340; Hill *v.* Gibbs, 5 Hill, 56; Wall *v.* Hinds, 4 Gray, 256; Decker *v.* Livingston, 15 Johns. 479; Lit. § 316.

[3] Childs *v.* Clark, 3 Barb. Ch. 52; Journeay *v.* Brackley, 1 Hilton, 447, 451; Walker's Case, 3 Rep. 26 *b*; Howland *v.* Coffin, 12 Pick. 125.

[4] Walker's Case, 3 Rep. 22; Lienow *v.* Ellis, 6 Mass. 331; Pine *v.* Leicester, Hobart, 37 *a*, note; Stevenson *v.* Lambard, 2 East, 575; Howland *v.* Coffin, 9 Pick. 52; s. c. 12 Pick. 125; Patten *v.* Deshon, 1 Gray, 325, 326; McKeon *v.* Whitney, 3 Denio, 452. In Vermont such an action is transitory by statute. Univ. of Vt. *v.* Joslyn, 21 Vt. 52; Buskin *v.* Edmunds, Cro. Eliz. 636; Thursby *v.* Plant, 1 Saund. 240, n.

made by him to the lessor, without notice, will be protected.[1] But where the lessor mortgaged his estate, and the lessee paid him the rent before it was due, but the mortgagee, when it was due, gave him notice and demanded the rent, it was held no defence that he had already paid it to his lessor.[2] But no act done by the assignor, after notice given to the other party of such assignment, will avail him; as where lessor, after assignment made, released the lessee from rent accruing due after the assignment was made.[3] The assignee of a lessee, holding under a recorded lease containing a mortgage of the premises, is bound to take notice of the contents thereof, and he would, without such record, be bound to know the contents of the lease under which he claims.[4] Where, however, the lessee has paid the rent of the term in advance, he will not be liable to pay the same again to an assignee of the reversion, although a purchaser, of the entire estate, without notice of such payment having been made. The lessee, in such case, is substantially a purchaser of the term.[5]

§ 707. **When Mortgagee liable as Assignee.** — The English courts regard a mortgagee of the lessee's interest as an assignee, and liable accordingly, though he may not have entered;[6] and in this opinion the court of New Hampshire coincides,[7] which is the more noticeable from the fact that it is held by the courts of that State that a man may become an assignee of a mortgage, with all legal rights as such, by a simple transfer of the mortgage debt by delivery without any writing.[8] In the United States court, one of the judges, in giving an opinion, waived "the much controverted and variously decided doctrine as to the responsibility of the mortgagee of leasehold property, but of which the mortgagee has

[1] Farley *v.* Thompson, 15 Mass. 18; Fitchburg Co. *v.* Melven, 15 Mass. 268; Trent *v.* Hunt, 9 Exch. 14.

[2] De Nicholls *v.* Saunders, L. R. 5 C. P. 589; Cook *v.* Guerra, L. R. 7 C. P. 132.

[3] McKeon *v.* Whitney, 3 Denio, 452.

[4] Barroilhet *v.* Battelle, 7 Cal. 450, 454; 1 Greenl. Ev. § 23.

[5] Stone *v.* Patterson, 19 Pick. 476.

[6] Williams *v.* Bosanquet, 1 Brod. & B. 238.

[7] M'Murphy *v.* Minot, 4 N. H. 251. But this is questioned in Lord *v.* Ferguson, 9 N. H. 380, 383.

[8] Southerin *v.* Mendum, 5 N. H. 420.

never had possession, for the performance of covenants," etc.[1] In Vermont the court refer to the English doctrine with favor, neither, however, adopting nor rejecting it.[2] In Maryland the mortgagee of a term, after breach of condition of the mortgage, was held to be liable upon the covenants in the lease, whether he had taken actual possession of the premises or not.[3] In California, the court held that the mortgagee of a term would not be liable upon the covenants in a lease, because of the peculiar character of mortgages in that State.[4] The better opinion as well as the weight of authority in this country seems to be, that such mortgagee becomes responsible as assignee when he takes possession under his deed, but not before.[5]

§ 708. **Effect of Assignment in Insolvency.** — There is a well-recognized distinction between a special assignment of a lease by a lessee, in respect to binding his assignee by the covenants in the lease, and an assignment of a lease as a part of the property of an insolvent debtor, whether by legal process under proceedings in bankruptcy or insolvency, or by a general assignment at common law for the benefit of his creditors. In the first case the assignee is liable, if he accepts the assignment, whether he has entered upon the premises under it or not.[6] In the other case, no privity of estate, such as is always understood to be created in the first case, will be considered to have arisen unless the lease shall have been specially mentioned in the general assignment, or the assignee shall have elected to claim the benefit of the same. And in cases of general assignments by insolvents, or by proceedings in insolvency, the assignee will have a reasonable time in which to ascertain whether the lease can be made available for the benefit of creditors before he will be obliged

[1] Calvert *v.* Bradley, 16 How. 593.

[2] Pingrey *v.* Watkins, 15 Vt. 479, 488. See also Graham *v.* Way, 38 Vt. 19, 24.

[3] Mayhew *v.* Hardesty, 8 Md. 479.

[4] Johnson *v.* Sherman, 15 Cal. 287. See Engels *v.* McKinley, 5 Cal. 153.

[5] Felch *v.* Taylor, 13 Pick. 133; 2 Greenl. Cruise, 111, n.; Walton *v.* Cronly, 14 Wend. 63; Astor *v.* Miller, 2 Paige, 68; 4 Kent, Com. (8th ed.) 175, n.; McKee *v.* Angelrodt, 16 Mo. 283; Astor *v.* Hoyt, 5 Wend. 603.

[6] Quackenboss *v.* Clarke, 12 Wend. 555; Taylor, Land. & Ten. (8th ed.) § 456; 2 Platt, Leases, 422.

to make his election, and this election may be manifested by acts as well as by words.[1]

§ 709. **Assignee cannot deny Validity of Assignment.** — But whether the assignment be absolute or conditional, if the assignee enters under it and occupies the estate, he can neither deny the validity of the assignment in an action by the lessor for rent, nor can he escape liability for the same by abandoning the premises before the expiration of the lease.[2]

§ 710. **Liability of Lessee after Assignment.** — An assignment of the lease does not change the lessee's liability on the express covenants of the lease. See *ante*, §§ 671, 683.

[1] Journeay *v.* Brackley, 1 Hilton, 447; White *v.* Hunt, L. R. 6 Exch. 32; Copeland *v.* Stephens, 1 B. & A. 593; Bagley *v.* Freeman, 1 Hilton, 196; Carter *v.* Warne, 4 C. & P. 191; Pratt *v.* Levan, 1 Miles, 358; *Re* Yeaton, 1 Lowell, 420; Hoyt *v.* Stoddard, 2 Allen, 442. So a receiver appointed by the court has his election. Commonwealth *v.* Frankl. Ins. Co., 115 Mass. 278. But the lessee remains liable for rent accruing due after the bankruptcy. Treadwell *v.* Marden, 123 Mass. 390.

[2] Blake *v.* Sanderson, 1 Gray, 332; Carter *v.* Hammett, 18 Barb. 608; s. c. 12 Barb. 253; Dorrance *v.* Jones, 27 Ala. 630. In the latter case, a debtor assigned his goods and store, and his assignee entered and occupied the store till the goods were sold, and then quit possession. Held to be such an entry as to bind him for rent of store for the whole balance of the term.

CHAPTER XXIV.

ESTATES FOR YEARS — OF RENT, EVICTION, DESTRUCTION AND USE OF THE PREMISES.

§ 711. Rent, how payable.
712. Rent barred by eviction.
713. Eviction by eminent domain.
714. Eviction by public enemy.
715. Eviction by act of lessor.
716. Actual eviction by landlord.
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722. Rent not affected by insurance.
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729. Lessee's remedies for breach of covenant to repair.
730. Obligations implied from nature of premises.
731. Apartment and tenement houses.
732. No implied restrictions as to use.
733. Of uses restricted by lease.
734. Lease for unlawful purposes.

§ 711. **Rent, how payable.** — Stringent as is the liability of a lessee and his assignee, under the covenants of a lease, no claim for rent arises except where it is payable in advance, until the lessee shall have enjoyed the premises the whole time for which the payment of a rent is stipulated to be made.[1] And where no time is fixed for such payment to be made, it is not due till the end of a year.[2] So, where payable

[1] Clun's Case, 10 Rep. 128; Bordman *v.* Osborn, 23 Pick. 295; Martin *v.* Martin, 7 Md. 368.

[2] Menough's Appeal, 5 Watts & S. 432; Ridgley *v.* Stillwell, 27 Mo. 128; Crabb, Real Prop. § 292; 3 Cruise, Dig. 272.

quarterly, no part is due till the end of the quarter.[1] Nor, when payable at a particular day, can it be apportioned as to a part of the time for which the tenant may occupy.[2] Accordingly, where by virtue of a right reserved to the lessor to determine the lease at any time by selling the estate, and he did so in the interval between the times of payment of rent, it was held that he could not recover in any form for the rent or use and occupation of the premises between the day of the last payment of rent and the determination of the lease.[3] And the same doctrine was applied where the demise was by parol, the tenancy having been determined by the lessor be-

[1] Garvey *v.* Dobyns, 8 Mo. 213; Wood *v.* Partridge, 11 Mass. 488; Perry *v.* Aldrich, 13 N. H. 343.

[2] Smith, Land. & Ten. 134; 3 Kent, Com. 470; Menough's Appeal, 5 Watts & S. 432; Clun's Case, 10 Co. 128 *a*; Cruger *v.* McLaury, 41 N. Y. 219, 223; Cameron *v.* Little, 62 Me. 550, applied in cases of tenancy at will. The statute Geo. II. as to apportionment of rent is not in force in New Hampshire. Perry *v.* Aldrich, 13 N. H. 343. But in Massachusetts, Pub. Stat. c. 121, § 8, in case of surrender, death of life tenant, or other like contingency, or notice to quit, the rent may be apportioned. The rules and principles stated in this section in regard to rent apply in a considerable degree to compensation for use and occupation, which is also barred by eviction and insusceptible of apportionment. But there seems to be much misconception as to the action for its recovery; a notion that this will only lie when rent as such cannot be recovered, and a want of distinction between its two forms, — debt and assumpsit. Both existed at common law, but the latter was liable to be defeated if a written demise was proved. By the statute 11 Geo. II. c. 19, however, it lay, unless a sealed lease existed. Gibson *v.* Kirk, 1 Q. B. 850. This statute did not give the action, as was suggested in Cleves *v.* Willoughby, 7 Hill, 83; it only removed one bar to it. Churchward *v.* Ford, 2 Hurlst. & N. 446; Hunt *v.* Wolfe, 2 Daly, 298, 302. This statute is supposed to be generally in force in the United States. Taylor, Land. & Ten. § 635. Where the lease is under seal, assumpsit will not lie. Kiersted *v.* Orange & A. R. R., 69 N. Y. 343. In Michigan, however, it will. Dalton *v.* Landahn, 30 Mich. 349. The action of debt for use and occupation always lay at common law, and the statute had no application thereto. Gibson *v.* Kirk, *supra*. Where the lease is under seal, though debt for rent lies, debt for use and occupation probably will not. Dungey *v.* Angove, 2 Ves. Jr. 307; Gudgen *v.* Besset, 6 Ellis & B. 986; and Wilkins *v.* Wingate, 6 T. R. 62, where it was allowed, is explained in Gibson *v.* Kirk, 1 Q. B. 853. In Fuller *v.* Ruby, 10 Gray, 285, 287, such a count was sustained, though the demise was under seal; but the later cases in the same State seem to hold any count for use and occupation bad in such a case. Hunt *v.* Thompson, 2 Allen, 341; Burnham *v.* Roberts, 103 Mass. 379. Rent in advance cannot be recovered in a count for use and occupation. Angell *v.* Randall, 16 L. T. N. S. 498.

[3] Nicholson *v.* Munigle, 6 Allen, 215; Zule *v.* Zule, 24 Wend. 76; Grimman *v.* Legge, 8 B. & C. 324; Hall *v.* Burgess, 5 B. & C. 332; Emmes *v.* Feeley, 132 Mass. 346.

tween the rent-days.[1] Thus where a parol lease was for a year, with the rent payable quarterly, and in the interval between two of these payments the lessor sold the premises, and the purchaser notified the tenant to quit, and he did so before another quarterly rent fell due, it was held that the tenant was not liable for the rent between the next previous quarter-day and the time of his quitting possession.[2]

§ 712. **Rent barred by Eviction.** — If, therefore, the lessee be evicted from the premises by the lessor or by a paramount title, it will discharge him from the payment of any rent which may fall due, by the terms of the lease, after such eviction.[3] And such eviction may be constructive as well as actual.[4] And the same rule would apply, *pro rata*, if he were evicted from a part of the premises by any other means than by the act of the lessor himself.[5] But an expulsion from a part of the premises will not affect the tenant's liability under any other of the covenants in his lease than that for the payment of rent; as, for instance, the covenant to repair.[6] But there can be no liability for rent, and no eviction until his tenancy has in fact commenced. Thus, where one hired a store in an unfinished building of another, from a certain date, and the tenant was to lay out certain expenses in fitting it up, and the landlord was to do other things, and after the date fixed, but before the building and room were completed, it was burned down, it was left to the jury to determine whether the lessee had taken possession under his lease or not, so as to be vested with the term. If he had, he was liable for the rent; otherwise he was not. Nor would the

[1] Fuller *v.* Swett, 6 Allen, 219, n.

[2] Robinson *v.* Deering, 56 Me. 357; Clun's Case, 10 Co. 128 *a*; Emmes *v.* Feeley, *supra*.

[3] Fitchburg Co. *v.* Melven, 15 Mass. 268; Wood *v.* Partridge, 11 Mass. 488; Russell *v.* Fabyan, 27 N. H. 529; Bordman *v.* Osborn, 23 Pick. 295; 2 Platt, Leases, 129; Rolle, Abr. Rent, O.; Franklin *v.* Carter, 1 C. B. 750; Pope *v.* Biggs, 9 B. & C. 245.

[4] Home Life Ins. Co. *v.* Sherman, 46 N. Y. 370.

[5] Hegeman *v.* McArthur, 1 E. D. Smith, 147; Broom's Maxims, 212; Stevenson *v.* Lambard, 2 East, 575; Smith *v.* Mulings, Cro. Jac. 160; Hunt *v.* Cope, Cowp. 242; Com. Land. & Ten. 523; Morrison *v.* Chadwick, 7 C. B. 266, 283; Martin *v.* Martin, 7 Md. 368; Lawrence *v.* French, 25 Wend. 443.

[6] Morrison *v.* Chadwick, 7 C. B. 283.

non-completion of the building be a defence in an action for the rent.[1] But if one is sued upon a covenant for rent, he may recoup for damages occasioned by a breach of other covenants in the same lease, though they are implied ones only.[2] And if, in cases like the one above stated, it had been stipulated in the lease that rent was not to commence until the building was completed, the lessee would not be liable until then, though he were to enter and occupy the premises before they were finished.[3]

§ 713. **Eviction by Eminent Domain.** — It has sometimes been attempted to apply the principle of eviction from a part of the premises, where lands under lease have been appropriated to public use under the exercise of eminent domain; and the rule adopted in Missouri is to have such appropriation extinguish the rent, payable by the tenant *pro tanto*, according to the value of the part taken compared with the whole.[4] But the better rule, and one believed to be adopted in most of the States, is that such a taking operates, so far as the lessee is concerned, upon his interest as property for which the public are to make him compensation, and does not affect his liability to pay rent for the entire estate according to the tenor of his lease.[5] And this extends to ground rent; such taking does not abate any part of the rent due.[6]

[1] LaFarge *v.* Mansfield, 31 Barb. 345.

[2] Mayor *v.* Mabie, 13 N. Y. 151; Wright *v.* Lattin, 38 Ill. 293; but not for the lessor's trespasses, Bartlett *v.* Farrington, 120 Mass. 284; and see Chic. Leg. News *v.* Brown, 103 Ill. 317.

[3] Epping *v.* Devanny, 28 Ga. 422.

[4] Biddle *v.* Hussman, 23 Mo. 597; Kingsland *v.* Clark, 24 Mo. 24. These cases rely on the authority of Cuthbert *v.* Kuhn, 3 Whart. 357; but that and other cases in Pennsylvania do not proceed in eviction, but on the equitable rights of the landlord and tenant. The statute of New York provides in such a case for an abatement *pro rata* of the tenant's rent. Gillespie *v.* Thomas, 15 Wend. 464, 468.

[5] Parks *v.* Boston, 15 Pick. 198; Ellis *v.* Welch, 6 Mass. 246; Patterson *v.* Boston, 20 Pick. 159; McLarren *v.* Spalding, 2 Cal. 510; Folts *v.* Huntley, 7 Wend. 210; Workman *v.* Mifflin, 30 Penn. St. 362; Frost *v.* Earnest, 4 Whart. 86; Foote *v.* Cincinnati, 11 Ohio, 408; Gluck *v.* Mayor of Baltimore, 81 Md. 315; s. c. 32 Atl. Rep. 515; s. c. 48 Am. St. Rep. 515; Corrigan *v.* City of Chicago, 144 Ill. 537; s. c. 33 N. E. Rep. 746; s. c. 21 L. R. A. 212, in which are copious and val-

[6] Workman *v.* Mifflin, 30 Penn. St. 362. The equitable reason for apportionment does not apply in cases of ground rent, as the lessor has no right to the land; and therefore none to damages given for it. Dyer *v.* Wightman, *supra*.

§ 714. **Eviction by Public Enemy.** — So it has been attempted to protect a tenant from paying rent *in toto* or *pro tanto*, where the leased premises have been seized upon and tenant evicted by a public enemy or a public armed force. In one case the court allowed an abatement of rent while the tenant was thus interrupted in his enjoyment of the premises.[1] But the law seems to be well settled that he would still be liable for the rent, though evicted in the manner supposed.[2]

§ 715. **Eviction by Act of Lessor.** — If the lessor himself interferes to deprive the lessee of the enjoyment of the leased premises, the law is in many respects much more stringent than where the act is done by a stranger. Thus, if he enters and evicts the tenant, wrongfully, from a part of the premises, it operates as a suspension of the entire rent, until possession shall be restored, instead of its being apportioned, as in the cases before stated, where the eviction of a part was the act of a stranger. Such, of course, would be the effect if the eviction by the lessor was from the entire premises.[3] So if the landlord make a second lease of a part of the premises embraced in a prior one, and the second lessee evicts the first, it is so far an eviction by the lessor, that he may refuse to pay rent, may abandon the premises, and remove the buildings, fences, etc., which he has erected thereon.[4] In case of eviction, the tenant

uable notes on the subject. Such a taking is not a breach of the covenant for quiet enjoyment. Ibid. This is admitted in Pennsylvania: cases *supra*; Peck *v.* Jones, 70 Penn. St. 83, 85; Schuylkill Co. *v.* Schmoele, 57 Penn. St. 271; but as equitable relief is given at common law, and in equity the lessee's damages replace the rent, to avoid circuity of action they are held to belong to the landlord; and the tenant is therefore relieved to that extent from his rent and other obligations in the lease, and apportionment takes place. Dyer *v.* Wightman, 66 Penn. St. 425. Cuthbert *v.* Kuhn, 3 Whart. 357, proceeded on the tenant's offer to apportion. Ibid.

[1] Bayly *v.* Lawrence, 1 Bay, 499.

[2] Wagner *v.* White, 4 Harr. & J. 564; Paradine *v.* Jane, Aleyn, 26; Schilling *v.* Holmes, 23 Cal. 227; Clifford *v.* Watts, L. R. 5 C. P. 577, 586.

[3] Hegeman *v.* McArthur, 1 E. D. Smith, 147; Salmon *v.* Smith, Saund. 204, n. 2; Lewis *v.* Payn, 4 Wend. 423; Wilson *v.* Smith, 5 Yerg. 379; Christopher *v.* Austin, 11 N. Y. 216; Broom's Maxims, 212; Ascough's Case, 9 Rep. 135; Shumway *v.* Collins, 6 Gray, 227; Morrison *v.* Chadwick, 7 C. B. 283; Lawrence *v.* French, 25 Wend. 443; Dyett *v.* Pendleton, 8 Cow. 727; Edgerton *v.* Page, 1 Hilton, 320, 328; 20 N. Y. 281; Hodgkins *v.* Robson and Thornborow, 1 Vent. 276; s. c. Pollexf. 142; Schilling *v.* Holmes, 23 Cal. 227; Pier *v.* Carr, 69 Penn. St. 326; Wright *v.* Lattin, 38 Ill. 293.

[4] Wright *v.* Lattin, 38 Ill. 293. As to damages, Larkin *v.* Misland, 100 N. Y. 212

is exempt from the payment of rent from the quarter-day anterior to such eviction.[1] If, after such eviction, the lessee returns and occupies again, the rent begins anew,[2] for, as before stated, if the eviction is from a part only, the tenancy may continue, but being suspended as to the rent. But to work this suspension of rent *pro tanto* or *in toto*, as the case may be, there must be something more than a mere entry upon the land or premises by the lessor, and doing acts of trespass thereon. For these he is liable as any other trespasser. There must be something which, in law, amounts to an eviction or expulsion of the tenant, to work a suspension or extinguishment of the rent.[3]

§ 716. **Actual Eviction by Landlord.** — [Eviction by the landlord is either actual or constructive. Any act done by the landlord or by his procurement which materially lessens the adaptability of the premises to the uses for which they were leased, may be treated by the tenant as an eviction. What amounts to an eviction in any given case is a question of fact, and this, as in dealing with the law of fixtures, has caused the courts to fall into great confusion. Where a landlord entered and partially destroyed a summer-house on the premises, the court left it to the jury to say whether there was an eviction.[4] Actual ouster from a part of the premises may be treated as eviction from the whole,[5] nor need the tenant quit in such case to free himself from rent for the residue.[6] So where the lessor let pigs into grounds rented for exhibition purposes, which rooted up the ground and made it unfit for use.[7] Anything of a grave and permanent nature done by the landlord with the intention of depriving the tenant of the enjoyment of

[1] Chatterton *v.* Fox, 5 Duer, 64.

[2] Martin *v.* Martin, 7 Md. 375 ; Morrison *v.* Chadwick, 7 C. B. 283.

[3] Bennet *v.* Bittle, 4 Rawle, 339; Martin *v.* Martin, 7 Md. 375 ; Com. Land. & Ten. 523 ; Salmon *v.* Smith, Saund. 204, n. 2 ; Hunt. *v.* Cope, Cowp. 242 ; Wilson *v.* Smith, 5 Yerg. 379 ; Lawrence *v.* French, 25 Wend. 443 ; Lounsbery *v.* Snyder, 31 N. Y. 514 ; Edgerton *v.* Page, 20 N. Y. 281, 284; Fuller *v.* Ruby, 10 Gray, 285 ; Royce *v.* Guggenheim, 106 Mass. 201 ; Pier *v.* Carr, 69 Penn. St. 326.

[4] Hunt *v.* Cope, Cowp. 242.

[5] Smith *v.* Raleigh, 3 Campb. 513; Sherman *v.* Williams, 113 Mass. 481.

[6] *Post*, § 719.

[7] Wright *v.* Lattin, 38 Ill. 293.

the premises may be treated as an eviction.[1] But not an act done by mistake, which the landlord offers to correct.[2] The intention is conclusively presumed from the act, if the deprivation is "permanent."[3] But mere acts of trespass to the person of the tenant or of trespass to the premises, however attended with inconvenience to the tenant, will not work an eviction.[4] And if the premises burn down and the landlord build a fence around and pull down the walls under order of the authorities, to ensure public safety, this will not work an eviction.[5]

§ 717. **Constructive Eviction.** — Any act or omission of the landlord, or by his procurement, not amounting to a physical interference with the enjoyment of the premises by the tenant, but which renders the further occupation thereof by the tenant grossly incompatible with health, comfort, or decent living, may be treated as a constructive eviction. Thus, were a part of a house demised, the establishment in the other part of a hospital for small-pox or plague, or a deposit of gunpowder or of pestilential materials, or the letting of such part to persons whose outrageous conduct rendered the rest of the house untenantable by decent people,[6] would be an eviction. Whether the facts of a particular case may be treated as an eviction is a question of fact; and constructive eviction differs from actual in that actual eviction does not require the tenant to quit to be relieved from paying rent; whereas, constructive eviction can only occur where the premises are rendered untenantable, and as long as the lessee continues to tenant them, the evidence

[1] Upton *v.* Greenlees, 17 C. B. 30, 64.

[2] Mirick *v.* Hoppin, 118 Mass. 582.

[3] Skally *v.* Shute, 132 Mass. 367.

[4] Vattel *v.* Herner, 1 Hilton, 149; Elliot *v.* Aiken, 45 N. H. 30; Bennett *v.* Bittle, 4 Rawle, 339; Gardner *v.* Ketchias, 3 Hill, 330; Royce *v.* Guggenheim, 106 Mass. 201; s. c. 8 Am. Rep. 322. *A fortiori*, an entry by the landlord for the tenant's benefit, as, to make repairs. Peterson *v.* Edmonson, 5 Harring. 378.

[5] Fleming *v.* King, 100 Ga. 449; s. c. 28 S. E. Rep. 239. The same is true of an entry to make repairs after a fire, the tenant making no objection. Phillips & Buttorff Mfg. Co. *v.* Whitney, 109 Ala. 645; s. c. 20 So. Rep. 333.

[6] Dyett *v.* Pendleton, 8 Cowp. 727; Edgerton *v.* Page, 1 Hilton, 320; s. c. 20 N. Y. 281; Boreel *v.* Lawton, 90 N. Y. 293; Leadbeater *v.* Roth, 25 Ill. 587; Sully *v.* Schmitt, 147 N. Y. 248; s. c. 41 N. E. Rep. 514.

against him is conclusive.[1] By preserving this distinction, an apparent conflict in the numerous cases disappears. Thus, if the landlord merely darken the windows of demised premises by the erection of a new building, it is not an eviction,[2] but if a building, so erected, against the tenant's consent, darken his windows so as to render the premises unfit for use, by reason of which he abandons them, it is an eviction. And it is for the jury to say whether the abandonment was justified.[3] The same principle was applied where one let a distillery and then prevented the lessee from getting a license.[4] So where the landlord failed to furnish heat as covenanted, whereby the premises became untenantable and were abandoned.[5]]

§ 718. **Act of Stranger, no Eviction.** — Not only must the act be such as materially interferes with the enjoyment of the premises by the lessee, but it must have been done by the lessor or his procurement or by paramount title. If the act be done by a stranger, it is no ground of defence against the claim for rent.[6] [It should be noted that the term "stranger" is here used in an entirely untechnical manner. It here means "wrong-doer," as distinguished from one who asserts paramount title.] Thus the erection of a wall by an adjacent owner, or even by the lessor himself upon his other premises, which darkens the windows of the leased premises, will not be deemed such an eviction as to relieve the tenant from the payment of rent.[7] [And yet there may be cases where the landlord will be estopped to take advantage of the fact that the act was that of a stranger, as where one rented a house of which he owned but three walls, saying nothing to the tenant of the ownership of the fourth, which was afterwards disturbed by its owner, rendering the premises uninhabitable.[8] The mere fact that the continued use

[1] See cases in preceding note. DeWitt *v.* Pierson, 112 Mass. 8; Lieferman *v.* Osten, 167 Ill. 93; s. c. 47 N. E. Rep. 203; s. c. 39 L. R. A. 156; Barrett *v.* Boddie, 158 Ill. 479; s. c. 42 N. E. Rep. 143; s. c. 49 Am. St. Rep. 172.

[2] Palmer *v.* Wetmore, 2 Sandf. 316; Myers *v.* Gemmel, 10 Barb. 537.

[3] Royce *v.* Guggenheim, 106 Mass. 201; Wright *v.* Lattin, 38 Ill. 293.

[4] Grabenhorst *v.* Nicodemus, 42 Md. 236.

[5] Bass *v.* Rollins, 63 Minn. 226; s. c. 65 N. W. Rep. 548.

[6] Welles *v.* Castles, 3 Gray, 323, 326.

[7] Hazlett *v.* Powell, 30 Penn. St. 293; Palmer *v.* Wetmore, 2 Sandf. 316; Moore *v.* Weber, 71 Penn. St. 429, 432. *Contra*, Hughes *v.* Hood, 50 Mo. 350; King *v.* Reynolds, 67 Ala. 229.

[8] Bentley *v.* Sill, 35 Ill. 414.

of the premises for the purposes for which they were leased becomes unlawful, will not work an eviction. As where the lessee is prevented from using the leased premises for the sale of liquor on account of the subsequent erection of a schoolhouse within a certain distance.[1]

§ 719. **Of Partial Eviction.** — Where the tenant is evicted from part of the premises by paramount title,] the rent will be apportioned and payable for such part as remains.[2] And this applies also where the demised property is an easement.[3] If the eviction is by the lessor himself, the tenant may elect whether to abandon entirely and put an end to the tenancy and rent all together,[4] or to retain such part as remains, free from liability to pay any rent, so long as the eviction continues. And such seems now the settled rule of law both in England and generally in the United States.[5] [Nor is it necessary that an actual eviction from part materially diminish the beneficial enjoyment of the remainder and more valuable portion.[6]] But as the tenancy in that case is not at an end, as soon as the occupancy is restored the liability revives to pay rent from and after such restoration.[7]

§ 720. **Possession by Tenant necessary to Eviction.** — [If a

[1] Miller *v.* McGuire, 18 R. I. 770 ; s. c. 30 Atl. Rep. 966.

[2] Fillebrown *v.* Hoar, 124 Mass. 580; Dyett *v.* Pendleton, 8 Cow. 727; Smith *v.* Malings, Cro. Jac. 160; Lawrence *v.* French, 25 Wend. 443; Seabrook *v.* Moyer, 88 Penn. St. 417 ; Com. Land. & Ten. 217, 525.

[3] Blair *v.* Claxton, 18 N. Y. 529.

[4] Smith *v.* Raleigh, 3 Camp. 513 ; Lawrence *v.* French, 25 Wend. 443 ; Christopher *v.* Austin, 11 N. Y. 216; Edgerton *v.* Page, 1 Hilton, 320, 328 ; Reed *v.* Reynolds, 37 Conn. 469.

[5] Hegeman *v.* McArthur, 1 E. D. Smith, 147 ; Vermilya *v.* Austin, 2 E. D. Smith, 203; Halligan *v.* Wade, 21 Ill. 470; Lewis *v.* Payn, 4 Wend. 423 ; Christopher *v.* Austin, 11 N. Y. 216; Fuller *v.* Ruby, 10 Gray, 285, where a decision was waived. Colburn *v.* Morrill, 117 Mass. 262 ; Anderson *v.* Chicago Ins. Co., 21 Ill. 601; Leishman *v.* White, 1 Allen, 489; Hayner *v.* Smith, 63 Ill. 430; Upton *v.* Greenlees, 17 C. B. 30, 65, 66 ; Morris *v.* Kettle, 57 N. J. L. 218 ; s. c. 30 Atl. Rep. 879. But in Alabama, by a long line of decisions, if the tenant remain in possession, the rent is only abated *pro tanto*. Crossthwaite *v.* Caldwell, 106 Ala. 295; s. c. 18 So. Rep. 47.

[6] Smith *v.* McEnany, 170 Mass. 26 ; s. c. 64 Am. St. Rep. 272 ; s. c. 48 N. E. Rep. 781.

[7] Morrison *v.* Chadwick, 7 C. B. 283, 284; Page *v.* Parr, Styles, 432 ; Lewis *v.* Payn, 4 Wend. 423 ; Lawrence *v.* French, 25 Wend. 443 ; Day *v.* Watson, 8 Mich. 535; Corning *v.* Gould, 16 Wend. 531, 538 ; Cibel *v.* Hills, 1 Leon. 110.

part of the leased premises is withheld by paramount title, the lessee may refuse to accept the other part.[1] But here, as in other cases, the possession of one under paramount title must be distinguished from that of a stranger having no title; for when the occupant is a wrongdoer — without title — the lessor is not liable to the lessee for not delivering possession.[2] And when a part of the premises is not delivered to the tenant, whether because it is held under paramount title, or by the landlord withholding it, if the lessee elects to occupy the remainder, he must pay rent *pro rata*,[3] since he cannot be said to have been evicted from what he never possessed.[4]]

§ 721. **Tenant's Liability to pay Rent, repair, and rebuild.** — Nothing will absolve a tenant, in whole or in part, from the covenants in his lease, except a release, surrender, eviction,[5] or a statute rendering the covenant impossible of performance.[6] Even equity will not interfere in the absence of fraud or mistake in drawing the lease.[7] Consequently the destruction of

[1] Hay *v.* Cumberland, 25 Barb. 594.

[2] Gardner *v.* Keteltas, 3 Hill, 330 ; Becker *v.* De Forest, 1 Sweeny, 528 ; Cozens *v.* Stevenson, 5 S. & R. 421 ; Sigmund *v.* Howard Bk., 29 Md. 324 ; Underwood *v.* Birchard, 47 Vt. 305 ; Gazzolo *v.* Chambers, 73 Ill. 75.

[3] Hurlbut *v.* Post, 1 Bosw. 28.

[4] The tenant upon eviction is not only relieved from paying rent, but may have damages also. Chatterton *v.* Fox, 5 Duer, 64. In case, however, of eviction by paramount title, the rule in New York and most of the United States was to give nominal damages, only, as the tenant's relief from rent was considered a full equivalent to him in analogy to the purchase-money in conveyances in fee. Kelly *v.* Dutch Church, 2 Hill, 105. But in Massachusetts and a few other States, and latterly in England, full damages are given in all cases of eviction. Dexter *v.* Manley, 4 Cush. 14 ; Hardy *v.* Nelson, 27 Me. 525 ; Horsford *v.* Wright, Kirby, 3 ; Williams *v.* Burrell, 1 C. B. 402 ; Lock *v.* Furze, L. R. 1 C. P. 441 ; Rolph *v.* Crouch, L. R. 3 Exch. 44. And though the former States adhere to the strict rule in case of eviction solely from paramount title, Mack *v.* Patchin, 42 N. Y. 167 ; Burr *v.* Stenton, 43 N. Y. 462 ; Lanigan *v.* Kille, 97 Penn. St. 120 ; yet if the tenant is deprived by the landlord's act or fraud, or could have been protected by him, full damages will be given ; Chatterton *v.* Fox, *supra ;* Trull *v.* Granger, 8 N. Y. 115 ; Mack *v.* Patchin, 29 How. Pr. 20 ; Ricketts *v.* Lostetter, 19 Ind. 125 ; Shaw *v.* Hoffman, 25 Mich. 162 ; Wilson *v.* Raybould, 56 Ill. 417.

[5] Fisher *v.* Milliken, 8 Penn. St. 111 ; Bain *v.* Clark, 10 Johns. 424 ; Shepard *v.* Merrill, 2 Johns. Ch. 276 ; Fuller *v.* Ruby, 10 Gray, 285, 290 ; Dyer *v.* Wightman, 66 Penn. St. 425.

[6] Cordes *v.* Miller, 39 Mich. 581. And in Massachusetts, the insolvency of decedent tenant's estate bars further rent. Dean *v.* Caldwell, 127 Mass. 242.

[7] Gates *v.* Green, 4 Paige, 355 ; Sheets *v.* Selden, 7 Wall. 416, 424.

the premises demised, or their becoming untenantable, from any cause, without lessor's fault, does not relieve the lessee from his covenant to pay rent, or to repair, or to restore the premises at the end of his term in good condition. Nor does it furnish any defence, either in full or *pro tanto*, against a lessor's claim under these covenants, unless there are exceptions to that effect in the lease.[1] And it would be held to be so, if the lessee covenants to pay rent for the term, and makes no exception for the contingency of the premises being destroyed.[2] This rests upon the ground that the lessee, in such cases, is the purchaser and owner of the premises for the term and price agreed upon in the lease,[3] and therefore not exempt from paying this price, though the premises are destroyed during the term by tempest, or fire,[4] the loss,[5] to that extent, being his and not the lessor's. So where the covenant was to surrender up the premises at the end of the term in good order and condition, it was held that the lessee must make the necessary repairs during the term.[6] And an obligation "to repair and deliver up" would require the tenant to rebuild, in

[1] Phillips *v.* Stevens, 16 Mass. 238; Leavitt *v.* Fletcher, 10 Allen, 121; Nave *v.* Berry, 22 Ala. 382; Niedelet *v.* Wales, 16 Mo. 214; Hallet *v.* Wylie, 3 Johns. 44; Clifford *v.* Watts, L. R. 5 C. P. 577, 586; Fowler *v.* Bott, 6 Mass. 63; White *v.* Molyneaux, 2 Ga. 124; Ward *v.* Bull, 1 Fla. 271; Howard *v.* Doolittle, 3 Duer, 464; Wood *v.* Hubbell, 5 Barb. 601; Davis *v.* Smith, 15 Mo. 467; Hill *v.* Woolman, 14 Me. 38; Linn *v.* Ross, 10 Ohio, 412. See *post*, § 731; Welles *v.* Castles, 3 Gray, 325. Ross *v.* Overton, 3 Call, 268, where tenant of a mill covenanted to leave it in repair, and it was carried off by ice, he was bound to pay rent and to perform his covenants. Hare *v.* Groves, 3 Anstr. 687; Holtzapffel *v.* Baker, 18 Ves. 115; Kramer *v.* Cook, 7 Gray, 550, where the wall of the leased building fell by the undermining of the neighboring proprietor, the lessor having neglected to support the wall. Sugden's Letters, 119; Story, Eq. Jur. § 101; Paradine *v.* Jane, Aleyn, 27, in which the distinction in the effect of inevitable accident, upon a duty assumed by contract and one imposed by law, is explained. So where the act of a stranger co-operated. Polack *v.* Pioche, 35 Cal. 416. But where the covenant of the tenant was to keep the premises in the same state as when taken, he was held not responsible for trees blown down. Main's Case, 5 Co. 20 *b*.

[2] Graves *v.* Berdan, 26 N. Y. 498. But where the lease is of a single room, as its destruction terminates the lease, Shawmut Bk. *v.* Boston, 118 Mass. 125, *post*, § 731, the tenant's obligation to pay rent ceases. Ibid.

[3] Hart *v.* Windsor, 12 M. & W. 68; McGlashan *v.* Tallmadge, 37 Barb. 313.

[4] Peterson *v.* Edmonson, 5 Harringt. 378.

[5] Beach *v.* Farish, 4 Cal. 339; Dyer *v.* Wightman, 66 Penn. St. 425.

[6] 1 Greenl. Ev. 233, n.; Jaques *v.* Gould, 4 Cush. 384.

case of a loss by fire, during the term. But if "to deliver up" alone, or "to restore" the premises, it imposes nothing beyond his not holding over.[1] But under the civil code of Louisiana, where a tenement was rendered untenantable by the owner of an adjacent parcel taking down, as he had a right to do, an adjoining party wall, the tenant might quit the premises, and thereby absolve himself from the payment of rent.[2]

§ 722. **Rent not affected by Insurance.** — The covenant to pay rent is wholly unaffected by any other covenant not expressly connected with it in the lease, and the lessor's insurance does not concern the lessee at all.[3] The tenant has no right in equity to have the insurance money applied in rebuilding the premises nor to restrain the lessor from suing for the rent until the structure is restored.[4] But it was held by the courts of Ohio, that where a lessee covenanted to insure the premises demised, if it was for the benefit of the lessor alone, the money in case of loss being to go to him, it would be a collateral covenant, and would not run with the land to bind an assignee. But if the money was to be applied to repair or rebuild, then it was in its character like a covenant to repair, which may run with the land.[5]

§ 723. **Effect of Accidental Destruction.** — Although it has been otherwise decided in South Carolina, and the common law

[1] Nave *v.* Berry, 22 Ala. 382; Maggort *v.* Hansbarger, 8 Leigh, 532; Bullock *v.* Dommitt, 6 T. R. 650. In Warner *v.* Hitchins, 5 Barb. 666, it is moreover held that a covenant to surrender up in the same condition as at the date of the lease does not bind to rebuild, as the covenant looks to redelivery and not to repair. So Howeth *v.* Anderson, 25 Tex. 557; Miller *v.* Morris, 55 Tex. 412; Levey *v.* Dyess, 51 Miss. 501. But the weight of authority seems otherwise. See Taylor Land. & Ten. (8th ed.) § 364 and n. In Ball *v.* Wyeth, 8 Allen, 275, a covenant to repair was held qualified by an exception from casualties in the covenant to deliver up; but Kling *v.* Dress, 5 Rob. (N. Y.) 521, is *contra*.

[2] Coleman *v.* Haight, 14 La. Ann. 564.

[3] See the remarks of the Chief Baron on Brown *v.* Quilter, in Hare *v.* Groves, 3 Anstr. 692; Leeds *v.* Cheetham, 1 Simons, Ch. 146, that one party to a lease has nothing to do with an insurance effected by the other party on his own account, or to resort to that for any redress for his loss. Belfour *v.* Weston, 1 T. R. 310. Lord Mansfield says, "The house being insured is nothing to the tenant." 2 Platt, Leases, 124, 125; Platt, Cov. 282; Magaw *v.* Lambert, 3 Penn. St. 444.

[4] Pope *v.* Garrard, 39 Ga. 471; Sheets *v.* Selden, 7 Wall. 416, 424; Moffatt *v.* Smith, 4 N. Y. 126; Bussman *v.* Ganster, 72 Penn. St. 285.

[5] Masury *v.* Southworth, 9 Ohio St. 340.

rule is said not to have been established in Kansas,[1] the law as to the effect upon rent of an accidental destruction of the premises is thus stated: "If the premises have been wrongfully entered by a disseisor, and the tenant be dispossessed for the entire term, or even by the military force of a public enemy, or if they have been destroyed or rendered untenantable by earthquake, lightning, flood, or fire, and thus all enjoyment by the tenant be entirely lost, yet his covenant remains."[2] In another case the court refused to have an abatement of rent of a farm made, although a bridge thereon, which was important to its enjoyment, was destroyed by a flood.[3]

§ 724. **Lessor's Liability for Repairs.** — Without an express covenant to that effect on the part of the lessor, he cannot be held liable for repairs made by the tenant upon the demised premises.[4] Nor would he be bound by a parol promise to make repairs, if such promise is founded only upon the relations of landlord and tenant.[5] Nor is he bound to repair them himself, unless expressly made so by covenant or to remove any nuisance, unless caused by his own act, or he has covenanted to that effect.[6] [Even where a building is let out in stories, each of which is in the exclusive possession and control of its lessee, the lessor is not liable to the lessee of a lower floor for repairs of damage to an upper floor, occurring without the landlord's fault, whereby the lower floor was rendered untenantable. So, a lease of water power furnished by a canal implies no covenant on the part of the lessor to keep the canal in repair and supply it with water.[7] The same

[1] Ripley *v.* Wightman, 4 McCord, 447; Whitaker *v.* Hawley, 25 Kan. 674.

[2] Dyer *v.* Wightman, 66 Penn. St. 425, 427; Workman *v.* Mifflin, 30 Penn. St. 369; Hoy *v.* Holt, 91 Penn. St. 88.

[3] Smith *v.* Ankrim, 13 S. & R. 39.

[4] Weigall *v.* Waters, 6 T. R. 488; Mumford *v.* Brown, 6 Cow. 475; Belfour *v.* Weston, 1 T. R. 312; City Council *v.* Moorhead, 2 Rich. 430; Biddle *v.* Reed, 33 Ind. 529; Witty *v.* Matthews, 52 N. Y. 512.

[5] Gill *v.* Middleton, 105 Mass. 477; Taylor *v.* Lehman, 17 Ind. App. 585; s. c. 46 N. E. Rep. 84.

[6] Arden *v.* Pullen, 10 M. & W. 321; Vai *v.* Weld, 17 Mo. 232; Gilhooly *v.* Washington, 4 N. Y. 217; Weigall *v.* Waters, 6 T. R. 488; Post *v.* Vetter, 2 E. D. Smith, 248; Welles *v.* Castles, 3 Gray, 323; Kramer *v.* Cook, 7 Gray, 550; 2 Platt, Leases, 183; Libbey *v.* Tolford, 48 Maine, 316; Moore *v.* Weber, 71 Penn. St. 429. See *ante*, § 686; Doupe *v.* Genin, 45 N. Y. 119; Haizlip *v.* Rosenburg, 63 Ark. 430; s. c. 39 S. W. Rep. 60.

[7] Trustees *v.* Brett, 25 Ind. 409; Sheets *v.* Selden, 7 Wall. 416.

is true of a milldam from which water power has been leased.[1]] And the grant of a right to take water from a well does not bind the owner of the well to repair it.[2]

§ 725. **Tenant, when liable to Strangers.** — It has been accordingly held that if a third party has sustained damages by defect or want of repair of premises in possession of a tenant, the law will presume that the tenant, and not the landlord, is responsible therefor, though this is subject to be rebutted by evidence.[3] This liability to a third party seems to depend upon whether the tenant has the entire control of the structure which causes the injury, or is one of several tenants having control only of the part he occupies. Thus, where one travelling along a street is injured by falling ice or snow from an awning in front of stores, one or more, in a building, or from the roof of the building, if the tenant in such cases has the sole control of the building, he alone is liable to the party injured. If the owner has the general charge of it, or of the roof, or occupies it in connection with tenants, he will be liable instead of the tenant who occupies a part only of the premises, for any injury from the part not expressly demised.[4] So if the injury arise from the erection of the building itself, or from a defect in its original construction, the landlord is liable.[5] So, if the demised premises are at the time of demise

[1] Morse *v.* Maddox, 17 Mo. 569.

[2] Ballard *v.* Butler, 30 Me. 94. See Gott *v.* Gandy, 2 Ellis & B. 845; Elliot *v.* Aiken, 45 N. H. 30, 36.

[3] Kastor *v.* Newhouse, 4 E. D. Smith, 20; Payne *v.* Rogers, 2 H. Bl. 349; Cheetham *v.* Hampson, 4 T. R. 318; Bishop *v.* Bedf. Charity, 1 Ellis & E. 697; Hadley *v.* Taylor, L. R. 1 C. P. 53; Irvine *v.* Wood, 51 N. Y. 224; Ditchett *v.* S. D. R. R., 67 N. Y. 425; Fisher *v.* Thirkell, 21 Mich. 1; Harris *v.* Cohen, 50 Mich. 324; Mellen *v.* Morrill, 126 Mass. 545; Stewart *v.* Putnam, 127 Mass. 403; St. Louis *v.* Kaime, 2 Mo. App. 66; Gridly *v.* Bloomington, 68 Ill. 47; Frischberg *v.* Hurter, 173 Mass. 22; s. c. 52 N. E. Rep. 1086.

[4] Kirby *v.* Boylst. Mkt., 14 Gray, 249; Milford *v.* Holbrook, 9 Allen, 17; Shipley *v.* Fifty Assoc., 101 Mass. 251; s. c. 106 Mass. 194; Readman *v.* Conway, 126 Mass. 374; Nash *v.* Minneapolis Co., 24 Minn. 501. Hence such parcel lessee may recover from the city for a defective sidewalk in front of the building, as he is not liable over. Burt *v.* Boston, 122 Mass. 223. But the owner is not liable to any one hurt on the premises, unless there by his invitation express or implied. Converse *v.* Walker, 30 Hun, 596; Mistler *v.* O'Grady, 132 Mass. 139; Fish *v.* Dodge, 4 Denio, 311; Pickard *v.* Collins, 23 Barb. 444.

[5] Durant *v.* Palmer, 29 N. J. 544; King *v.* Pedly, 1 Ad. & E. 827; Scott *v.* Simons, 54 N. H. 426; Larue *v.* Farren Hotel Co., 116 Mass. 67; Stratton *v.*

a nuisance, he is liable as creating it,[1] though the tenant may also be liable for continuing it.[2] And upon this ground, an owner has been held liable if the premises which are out of repair are open to the public for the profit which may arise from the use of them, as in the case of a wharf belonging to an individual; and he is bound to keep it safe for the purposes for which it has been opened, whoever is in occupation, though a sub-tenant would also be liable for an injury arising to one using it, from want of repair.[3] This class of cases proceeds upon the ground that any construction within the limits of a public way is an incipient nuisance, and the owner becomes liable, through whosesoever neglect it becomes an active one.[4] But a different view prevails in other States, and if the injury results from the tenant's not keeping in repair what he is bound to do, he, and not the landlord, would be liable, though the structure was under the public way. Thus where the landlord leased premises bounding upon a street, and the tenant covenanted to repair and keep the premises in repair, and one passing along the street sustained an injury by a defective grating opening into the street, but of which defect neither the landlord nor the tenant knew anything, it was held the tenant was liable to the party injured, by reason of being in possession of the premises, and their being suffered to be defective.[5] But there is no liability either of landlord or tenant for defects in the highway in front of premises, caused by the wrongful act

Staples, 59 Me. 94; Godley *v.* Hagerty, 20 Penn. St. 387; Carson *v.* Godley, 26 Penn. St. 111.

[1] House *v.* Metcalf, 27 Conn. 631; Wenzler *v.* McCotter, 22 Hun, 60; but see Shindelbeck *v.* Moon, 31 Ohio St. 264, where upon similar facts a different conclusion was reached. In Helwig *v.* Jordan, 53 Ind. 21, a kiln was so held, and the lessor responsible for a fire originating from it by tenant's negligence.

[2] 3 Bl. Com. 221; Staple *v.* Spring, 10 Mass. 72; Ingwersen *v.* Rankin, 47 N. J. L. 18; Fow *v.* Roberts, 14 W. No. Cas. 307; Knauss *v.* Brua, 107 Penn. St. 85.

[3] Clancy *v.* Byrne, 56 N. Y. 129.

[4] Swords *v.* Edgar, 59 N. Y. 28; Owings *v.* Jones, 9 Md. 108; Congreve *v.* Smith, 18 N. Y. 79; Whalen *v.* Gloucester, 4 Hun, 24. Cf. Tarry *v.* Ashton, 1 Q. B. D. 314.

[5] Gwinnell *v.* Eamer, L. R. 10 C. P. 658; Pretty *v.* Bickmore, L. R. 8 C. P. 401. Cf. Leonard *v.* Storer, 115 Mass. 86; Stewart *v.* Putnam, 127 Mass. 103; Cheetham *v.* Hampson, 4 T. R. 318. Fire-escapes, Keely *v.* O'Conner, 106 Penn. St. 321; Schult *v.* Harvey, 105 Penn. St. 222.

of another, nor for defective sidewalks or flagstones and gratings within the limits of the highway, where neither the owner nor occupant was at fault. The public, in such case, is liable to the party injured thereby.[1] If the tenant is responsible for that which causes an injury to a passenger in the highway, and the latter recovers in an action against the town or city for the damages thereby sustained, the city or town may recover of the tenant what they have been obliged to pay in satisfaction of the same.[2] If the builder of the house cause an excavation to be made which endangers the passenger, and the tenant continues it after he comes into possession, the person injured thereby may have his action against either.[3] But if the owner of land dedicates a way across it to the public which is unsafe, and they accept it, the public, and not he, are responsible to any one who is injured thereby while using it.[4] *

§ 725 *a*. **Tenant, when liable to Strangers, continued.** — A ten-

* Note. — A question akin to those discussed in the text arises where an owner of land adjoining a highway excavates a hole on his own land so near the street as to be dangerous to travellers — what is the landowner's liability to a traveller who is injured? In Massachusetts it was held that he was not liable although the excavation was within "a foot or two" of a public street. Howland *v.* Vincent, 10 Met. 371. In an English case the defendants were the hirers and occupants of a warehouse which was not yet completed. A "hoist hole" was dug within fourteen inches of the line of the street which was used in erecting the warehouse, but no barrier was placed between it and the street. The plaintiff sustained injury by falling into the hole in the night-time when passing along the street, and was held to be entitled to recover damages for the injury thus sustained, of the defendants. Hadley *v.* Taylor, L. R. 1 C. P. 53. In another case, the occupant of the land dug out "an area" "near" the street, into which a passenger fell, there being no barrier between them, and he was held liable for the injury thereby sustained. Barnes *v.* Ward, 9 C. B. 392. See also Birge *v.* Gardiner, 19 Conn. 507; Hydraulic Wks. *v.* Orr, 83 Penn. St. 332; and Beck *v.* Carter, 68 N. Y. 283, where Howland *v.* Vincent is denied to be law. And the doctrine of that case is difficult to reconcile with the principle of Rylands *v.* Fletcher, L. R. 3 H. L. 330, recognized in Shipley *v.* Fifty Assoc., 101 Mass. 251. But where the vault into which the plaintiff fell was upon a part of the landowner's premises, across which the public often passed, but without right, and the landowner had repeatedly sent persons back who were attempting to cross, it was held that no action would lie for the injury sustained by the plaintiff. Stone *v.* Jackson, 16 C. B. 199.

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[1] Robbins *v.* Jones, 15 C. B. N. S. 221.

[2] Durant *v.* Palmer, 29 N. J. 546; Chicago *v.* Robbins, 2 Black, 418; Robbins *v.* Chicago, 4 Wall. 657.

[3] Durant *v.* Palmer, 29 N. J. 548; McDonough *v.* Gilman, 3 Allen, 264.

[4] Robbins *v.* Jones, 15 C. B. N. S. 221.

ant for years is responsible for restoring what is a nuisance to a right of way, although it existed when he became such tenant. So he would be for any such nuisance created by himself. But if existing at the time of his becoming tenant, he would not be liable for continuing it until after he is notified that it is a nuisance.[1] But the owner or tenant of land is not responsible to another who is injured by an act done upon his land, where it is done without his agency or permission, as where a third person, without right, placed obstructions in a watercourse upon the land through which it flowed, which caused an injury to a mill-owner below. The mill-owner could neither call upon the land-owner to remove these, nor hold him responsible for their being there.[2]

§ 726. **Construction of Lessee's Restricted Liability.** — And even where a lessee guards himself, as he usually does, against being responsible for casualties occurring to the premises while in his occupation, the courts do not extend this restriction beyond the language of the lease. As where the lease provided that the rent should cease upon the premises becoming untenantable by fire or other casualty, it was held no defence that they had become so by widening and altering the grade of the street on which they stood by the authority of the city.[3] Nor would the tenant, in case of such provision, have a right to abandon the premises, and put an entire stop to the rent by reason of a partial destruction of the premises, though it rendered such part uninhabitable until repaired.[4] So where the rent, or a proportionate part, was to stop, if the premises or any part thereof were destroyed or damaged by "unavoidable casualty," it was held not to extend to cases of gradual and natural decay. Nor could the tenant, if he continued to occupy, refuse to pay the rent.[5] On the other hand, where the lessee excepted, from his covenant to keep the buildings in repair, such want of repair as arose from fire and natural

[1] McDonough *v.* Gilman, 3 Allen, 264; Johnson *v.* Lewis, 13 Conn. 303. But see Brown *v.* Cayuga R. R., 12 N. Y. 486, that this is only in respect to abatement, not damages.

[2] Saxby *v.* Manchester, etc. R. R., 38 L. J. N. S. C. P. 153.

[3] Mills *v.* Bachr, 24 Wend. 254.

[4] Wall *v.* Hinds, 4 Gray, 256.

[5] Welles *v.* Castles, 3 Gray, 323; Bigelow *v.* Collamore, 5 Cush. 226.

"wear and tear," it was held that the latter clause was not restricted to a gradual deterioration, but would extend to any accident caused by a defect in the structure, as where a mill that was leased fell from some inherent defect.[1]

§ 727. **Lessor's Remedy for Breach of Covenant to repair.** — The covenant to maintain buildings in repair upon leased premises is binding at all times, and for a breach thereof the lessor is not bound to wait until the expiration of the lease. He may sue for the breaches as they arise during the term, after a refusal or neglect on the part of the tenant to repair within a reasonable time.[2] The extent of the repairs required of the tenant, as stated by Tenterden, C. J., is that "a tenant who covenants to repair is to sustain and uphold the premises. But that is not the case with a tenant from year to year. He is only bound to keep the house wind and water tight."[3]

§ 728. **Tenant not liable for Fire.** — In the absence of an express covenant to repair, the tenant of buildings is not liable for the accidental destruction thereof by fire; and this is the common law of this country, borrowed from the English acts of 6 Anne, c. 31, § 67, and 14 Geo. III. c. 78.[4]

§ 729. **Lessee's Remedies for Breach of Covenant to repair.** — "Where a landlord has covenanted to repair and does not do so, the tenant has several remedies. He may abandon the premises if, by reason of want of repair, they have become untenantable; or he may make the repairs and deduct the cost from the rent; or he may sue for damages for the breach of covenant to repair."[5]

§ 730. **Obligations implied from Nature of Premises.** — It has been held that where real property was leased, and with it personal property, like machinery, which was to be used with and by means of the premises leased, the lessor was thereby bound to do nothing to interrupt the enjoyment, by the lessee, of the property leased, for the purpose for which the same had

[1] Hess *v.* Newcomer, 7 Md. 325.

[2] Buck *v.* Pike, 27 Vt. 529; Com. Land. & Ten. 210.

[3] Anworth *v.* Johnson, 5 Car. & P. 239.

[4] Wainscott *v.* Silvers, 13 Ind. 497; Lansing *v.* Stone, 37 Barb. 15; 2 Platt, Leases, 187.

[5] McCardell *v.* Williams, 19 R. I. 701; s. c. 36 Atl. Rep. 719, where authorities will be found collated upon each of the propositions of the text.

been usually occupied and employed.[1] So where a factory is leased with its machinery, it carries, by implication, a right to use the water-power of the lessor, belonging to the same, for the purpose of operating the mill.[2] But the lease of a store or warehouse, or the like, does not, ordinarily, imply any warranty that the building is safe, or well built, or that the premises are fit for any particular use.[3] Or that the premises are in a tenantable condition, or that the lessor will make repairs.[4] Nor would a lease of a salt-well be held to be an assurance of the productiveness or capacity of the well.[5] Nor is there any implied warranty in a lease of a house for a private residence, that it is reasonably fit for habitation.[6] Nor can a lessee, in the absence of fraud or misrepresentation as to the healthfulness of a house leased to him, abandon the premises because the same are unhealthful, and thereby avoid paying rent.[7] In a case where a "furnished house" was rented, it was held to imply that it was so far fit for use that the tenant was held justified in quitting because infested with bugs. But the law of the case seems doubtful, and is confined strictly to cases of houses furnished.[8] Many of the propositions above

[1] Dexter *v.* Manley, 4 Cush. 14.

[2] Wyman *v.* Farrar, 35 Me. 64.

[3] Dutton *v.* Gerrish, 9 Cush. 89; Platt, Leases, 613; O'Brien *v.* Capwell, 59 Barb. 497; Royce *v.* Guggenheim, 106 Mass. 201; Loupe *v.* Wood, 51 Cal. 586; Taylor *v.* Bailey, 74 Ill. 178; Moore *v.* Weber, 71 Penn. St. 429; Arden *v.* Pullen, 10 M. & W. 321; Izon *v.* Gorton, 5 Bing. N. C. 501; Sauer *v.* Bilton, 7 Ch. D. 815; Manch. Wareh. Co. *v.* Carr, 5 C. P. D. 507; Taylor, Land. & Ten. § 381. In the case of a lease of the vesture of land for depasturing by cattle, it was held that the lessee was liable to pay rent, though poisonous substances, fatal to the cattle that fed there, had been scattered on the land by some one not the lessor. Sutton *v.* Temple, 12 M. & W. 52.

[4] Gill *v.* Middleton, 105 Mass. 477.

[5] Clark *v.* Babcock, 23 Mich. 164, 170.

[6] Foster *v.* Peyser, 9 Cush. 242; Smith, Land. & Ten. 206; Hart *v.* Windsor, 12 M. & W. 68; Wheeler *v.* Crawford, 86 Penn. St. 327.

[7] Westlake *v.* De Graw, 25 Wend. 669.

[8] Smith *v.* Marrable, 11 M. & W. 58 (Am. ed.), note. See also Sutton *v.* Temple, 12 M. & W. 52, and Hart *v.* Windsor, id. 68, overruling the cases on which Smith *v.* Marrable was decided. Smith, Land. & Ten. 206, n.; Taylor, Land. & Ten. § 381. It has also been repeatedly denied to be law in the United States. Foster *v.* Peyser, 9 Cush. 242; Howard *v.* Doolittle, 3 Duer, 464; Naumberg *v.* Young, 44 N. J. 331. It was reaffirmed in Wilson *v.* Finch Hatton, 2 Exch. D. 336; but is limited in Manch. Wareh. Co. *v.* Carr, 5 C. P. D. 507, and its principle denied in Robertson *v.* Amazon Tug Co., 46 L. T. N. S. 146.

stated, and the cases referred to, were considered in a case in New York, where the court sustain the doctrine as there given, and say, "The maxim of *caveat emptor* applies to the contract of hiring of real property, as it does to the transfer of all property, real, personal, or mixed;" and in the absence of fraud on the part of the lessor, there is no implied warranty that the premises are fit for the use for which the lessee requires them.[1]

§ 731. **Apartment and Tenement Houses.** — Where the tenant of part of a building suffers damage from the defective condition of a part of the house not included within his demise, but which he is licensed to use, or which is in the common use or for the common benefit of all the tenants;[2] or is injured by the neglect of another parcel tenant, or the defective condition of the latter's premises,[3] in neither case is the landlord liable. But if the landlord has separate control of the defective part of the premises, he is liable to the tenant for an injury caused by such defect.[4] And where the premises

[1] McGlashan *v.* Tallmadge, 37 Barb. 313. So Hazlett *v.* Powell, 30 Penn. St. 293; Wheeler *v.* Crawford, 86 Penn. St. 327; Mayer *v.* Moller, 1 Hilton, 491; Acad. of Music *v.* Hackett, 2 Hilton, 217, 235; Welles *v.* Castles, 3 Gray, 323; Libbey *v.* Tolford, 48 Me. 316; Elliot *v.* Aiken, 45 N. H. 30; Gott *v.* Gandy, 2 Ellis & B. 845; Cleves *v.* Willoughby, 7 Hill, 83; Naumberg *v.* Young, 44 N. J. 331. And the lessor's liability is no greater to a customer, servant, or visitor of the tenant than to the tenant himself. Jaffe *v.* Harteau, 56 N. Y. 398; Robbins *v.* Jones, 15 C. B. N. S. 221; Burdick *v.* Cheadle, 26 Ohio St. 393. The mere omission to disclose a known defect was held not to be fraud in Keates *v.* Cadogan, 10 C. B. 591. But in Wallace *v.* Lent, 1 Daly, 481; Minor *v.* Sharon, 112 Mass. 477; Cesar *v.* Karutz, 60 N. Y. 229, where there was a nuisance dangerous to health or life, it was held the landlord's duty to disclose it; and in a still more recent case, Coke *v.* Gutkese, 80 Ky. 598, the lessor was held liable to the tenant for an injury from an undisclosed defect in the flooring; and see Crump *v.* Morrell, 35 Leg. Int. 374; Looney *v.* McLean, 129 Mass. 33.

[2] Carstairs *v.* Taylor, L. R. 6 Exch. 217; Anderson *v.* Oppenheimer, 5 Q. B. D. 602; Humphrey *v.* Wait, 22 Up. Can. C. P. 580; Purcell *v.* English, 86 Ind. 34; Ivay *v.* Hedges, 9 Q. B. D. 80. And the case of Looney *v.* McLean, 129 Mass. 33, *contra*, is distinguished in Woods *v.* Naumkeag Co., 134 Mass 357. In Krueger *v.* Ferrant, 29 Minn. 385, the court held this to apply even in a case of a defective roof, and refer to Pierce *v.* Dyer, 109 Mass. 374; but the case of co-tenants is not in analogy, as between them there is no invitation.

[3] Simonton *v.* Loring, 68 Me. 164; McCarthy *v.* York Co. Bk., 74 Me. 315. The case of Jones *v.* Freidenberg, 66 Ga. 505, *contra*, is wholly unsupported by authority outside of that State, the cases upon which it rests proceeding on actual control or interference by the landlord.

[4] Toole *v.* Beckett, 67 Me. 544; Priest *v.* Nichols, 116 Mass. 401.

were a cellar and lower room in a house of several stories, and, during the term, the house was destroyed by fire, it was held that the lessee's interest was thereby gone, and that he could not continue to occupy by covering in the cellar.[1] And the same principle was applied where the lease was of one of many rooms in a building which was burned down, and the lessor rebuilt during the term of the hiring, it was held that the lessee's entire interest was gone, and the lessor was under no obligation to give him the use of a corresponding room in the new building.[2] But in such a case the rent of such destroyed premises ceases with their destruction, the subject-matter of the demise no longer existing.[3] In England, however, where one was a tenant from year to year of a second floor of a building which was destroyed by fire, he was held liable for rent of the premises after they were destroyed until a regular determination of the tenancy.[4]

§ 732. **No Implied Restrictions as to Use.** — So in respect to the lessee, unless he is restrained by the terms of his lease, he may make use of the premises for any lawful purposes he may choose, though different from those for which they were

[1] Winton *v.* Cornish, 5 Ohio, 477; Shawmut Bk. *v.* Boston, 118 Mass. 125.

[2] Stockwell *v.* Hunter, 11 Met. 448; Alexander *v.* Dorsey, 12 Ga. 12; Ainsworth *v.* Ritt, 38 Cal. 89; McMillan *v.* Solomon, 42 Ala. 356; Womack *v.* McQuarrie, 28 Ind. 103.

[3] Graves *v.* Berdan, 29 Barb. 100; s. c. 26 N. Y. 498; Doupe *v.* Genin, 45 N. Y. 119, 123. So in a recent case it has been held that where personal property is a substantial part of the demise the rent will be proportionately abated upon its destruction, Whitaker *v.* Hawley, 25 Kan. 671, citing Richards *v.* Tavernor's Case, Dyer, 56 *a*, and see Newton *v.* Wilson, 3 Hen. & M. 470; but the authorities on this point are not clear. The rule is strictly held in England that rent flows only from the realty. Newman *v.* Anderton, 5 B. & P. 224; Farewell *v.* Dickenson, 6 B. & C. 251; Salmon *v.* Mathews, 8 M. & W. 827. In Meckle *v.* Miles, 31 Penn. St. 20, it is said rent flows as well from personalty, parcel of the demise; but the point decided was only that it could be distrained for, qualifying Commonwealth *v.* Contner, 18 Penn. St. 439. So in Armstrong *v.* Cummings, 20 Hun, 313, it was held summary process would lie, and in Sutliff *v.* Atwood, 15 Ohio St. 186, that the covenant to pay it ran on a lease in part of personalty; though in both the English rule was asserted. In Bussman *v.* Ganster, 72 Penn. St. 285; Fay *v.* Holloran, 35 Barb. 295, however, apportionment was denied; but in the former case it was a *dictum*, and in the latter the personalty was incidental only. But in Vetter's App., 99 Penn. St. 52, the lessor's taking the personalty was held an eviction.

[4] Izon *v.* Gorton, 5 Bing. N. C. 501; see Graves *v.* Berdan, 26 N. Y. 498.

designed, if not materially and essentially affecting the condition of the same. As where one hired a house erected for the purposes of a hotel, but made no covenant in respect to the mode of its occupancy, and converted it into a public seminary, it was held that the lessor could not object to that use of the premises.[1]

§ 733. **Of Uses restricted by Lease.** — But where the mode of occupation is fixed by the lease, not only may the tenant be enjoined from converting the estate to other purposes,[2] but, in some cases, his so doing has been held to work a forfeiture for which the lessor might enter and expel him;[3] as where a shop was let for a regular dry-goods jobbing business, and the tenant undertook to use it as an auction-room, though no special damage could be shown to accrue from such a use.[4]

§ 734. **Lease for Unlawful Purposes.** — If premises are let for unlawful purposes, such for instance as the unlawful sale of spirituous liquors, the lessor cannot recover rent therefor: the lessee's covenant to pay it would be void.[5]

[1] Nave *v.* Berry, 22 Ala. 382.

[2] Howard *v.* Ellis, 4 Sandf. 369; Maddox *v.* White, 4 Md. 72.

[3] Shepard *v.* Briggs, 26 Vt. 149.

[4] Steward *v.* Winters, 4 Sandf. Ch. 587. But no general restriction will be implied from a special restriction as to part of the demise. Reed *v.* Lewis, 74 Ind. 433.

[5] Sherman *v.* Wilder, 106 Mass. 537.

CHAPTER XXV.

ESTATES FOR YEARS — OF SURRENDER, MERGER, ETC.

§ 735. What is a surrender — Statute of frauds.
736. Third parties' rights cannot be affected.
737. What amounts to surrender.
738. Substitution of parol lease.
739. Effect of surrendering possession.
740. Merger.
741. Merger of leasehold in freehold.
742. Merger of leasehold in leasehold in reversion.
743. No merger of leasehold in leasehold in remainder.
744. Merger of estates held in different rights.

§ 735. **What is a Surrender — Statute of Frauds.** — If a tenant for life or years yields up his estate to him who has the immediate estate in reversion or remainder, it is called by the law a *surrender*, the effect of which is to extinguish all claim for rent not due at the time. The estate for years, in such case, is "drowned by mutual agreement between them."[1] But if an estate, however brief, intervenes between the two estates, there cannot be a technical surrender or a merger thereof.[2] To do this requires, under the statute of frauds, a deed or note in writing, or some act to which the law gives that effect.[3] A parol surrender of a lease is of no validity, nor is evidence of such surrender competent,[4] [unless such surrender was followed by acts which amount to surrender by operation of law.[5]] Nor would it make any difference if,

[1] Co. Lit. 338 *a*; Smith, Land. & Ten. 223; Greider's Appeal, 5 Penn. St. 422; Curtiss *v.* Miller, 17 Barb. 477; Bailey *v.* Wells, 8 Wis. 141.

[2] Burton *v.* Barclay, 7 Bing. 745.

[3] Hesseltine *v.* Seavey, 16 Me. 212; Smith, Land. & Ten. 224; Farmer *v.* Rogers, 2 Wils. 26; Allen *v.* Jaquish, 21 Wend. 628; Jackson *v.* Gardner, 8 Johns. 394.

[4] Bailey *v.* Wells, 8 Wis. 141.

[5] Alschuler *v.* Schiff, 164 Ill. 298; s. c. 45 N. E. Rep. 424; Lovejoy *v.* McCarty, 94 Wis. 341; s. c. 68 N. W. Rep. 1003. And see *post*, § 739.

when the written lease was made, it had been orally agreed by the lessor that the lessee might surrender his lease at any time he might choose.[1] Nor would the cancelling of the lease revest the estate in the lessor, or operate as a bar to the recovery of rent by the holder of the reversion.[2] And by the statute 8 & 9 Vict. c. 106, § 3, it can only be done, if in writing, by deed. But if the lease do not exceed the term for which a parol lease would be good, there may be a parol surrender of the same.[3]

§ 736. **Third Parties' Rights cannot be affected.** — It is not, however, competent for the lessor and lessee to affect the rights of third parties by a formal surrender of the lease, as, for instance, those of the lessee's sub-tenant.[4]

§ 737. **What amounts to Surrender.** — If the lessee of a term takes a new lease of the same premises, to take effect before the expiration of such term, it works a surrender of the first, on account of the incompatibility of the two leases, both of which cannot be valid at the same time, unless there are facts in the case clearly rebutting such inference.[5] It must be made clearly to appear, in the absence of any deed or written instrument, that it was the intention of the parties to create a new lease of the premises, and substitute a new and different estate from that granted by the original lease.[6] So where the lessee leased the demised premises to his lessor, the owner of the immediate reversion in fee, by an instrument like that by which he became lessee, it was held to be a surrender by the lessee and a merger in the lessor.[7] But where the first lease was from two, and the lease back again was to one only, it did not operate as a surrender.[8] Nor, where the original

[1] Brady *v.* Peiper, 1 Hilton, 61.

[2] Ward *v.* Lumley, 5 H. & Norm. 88–94, and note to Am. ed.

[3] Kiester *v.* Miller, 25 Penn. St. 481 ; M'Kinney *v.* Reader, 7 Watts, 123.

[4] McKenzie *v.* Lexington, 4 Dana, 129 ; Smith, Land. & Ten. 231 ; Piggott *v.* Stratton, Johns. Ch. (Eng.) 355 ; Adams *v.* Goddard, 48 Me. 212, 215.

[5] Burton, Real Prop. § 904 ; Wms. Real Prop. 337 ; Smith, Land. & Ten. 225–330, n. ; Mellow *v.* May, Moore, 636 ; Van Rensselaer *v.* Penniman, 6 Wend. 569 ; Livingston *v.* Potts, 16 Johns. 28 ; Co. Lit. 338 *a* ; McDonnell *v.* Pope, 9 Hare, 705 ; Lyon *v.* Reed, 13 M. & W. 285 ; Roe *v.* York, 6 East, 86 ; Bailey *v.* Wells, *supra.*

[6] Brewer *v.* Dyer, 7 Cush. 337, 339.

[7] Shepard *v.* Spaulding, 4 Met. 416.

[8] Sperry *v.* Sperry, 8 N. H. 477.

lease was by one lessor to several lessees, can one of these lessees affect the rights of his co-lessees by releasing or conveying to his lessor.[1]

§ 738. **Substitution of Parol Lease.** — [It would seem that a parol lease may be substituted for an existing lease, even if it be under seal, if the substituted lease is binding under the statute of frauds, and is followed by possession under it.] In such case, consistently with the cases above cited, taking a new parol lease would seem to be a surrender in law of the existing one under seal; while, if such second lease were not valid, there would be no surrender.[2] In some cases where the lessee has assigned his lease or underlet to another, for his entire term, in writing, and the original lessor has orally assented to the same, and has accepted rent from the assignee, it has been held to operate as a surrender of the original lease, and a substitution of a new tenancy.[3] But it is difficult to see upon what legal ground such oral assent can be held to be a bar to an action upon the lessee's express covenant to pay rent.[4] And the following case seems to recognize this distinction, the parol agreement of the parties being followed by acts done towards carrying this agreement into practical effect. The lessee of a term of ten years assigned it by the parol assent of the lessor, who agreed to look to the assignee for the rent, and to accept him as his tenant, and that the lessee should be discharged. It was held to be a surrender so far as the lessee was concerned, and to discharge him from his obligations as such. But the circumstance of accepting rent from the assignee of the lessee does not discharge him; it is merely accepting payment through the hands of another.[5]

[1] Baker *v.* Pratt, 15 Ill. 568.

[2] Coe *v.* Hobby, 72 N. Y. 141; Thomas *v.* Cook, 2 B. & A. 119; McDonnell *v.* Pope, 9 Hare, 705; Davison *v.* Gent, 1 Hurlst. & N. 744; Smith *v.* Niver, 2 Barb. 180; Bedford *v.* Terhune, 30 N. Y. 453. But where the lessee expressed a wish to the lessor to substitute as tenant a third person who was present at the time, and the lessor said if the rent was paid it would be all right, but the lease was not cancelled, it was held not to be a surrender as there had been no substitution. Whitney *v.* Myers, 1 Duer, 266.

[3] Logan *v.* Anderson, 2 Doug. (Mich.) 101; Bailey *v.* Delaplaine, 1 Sandf. 5; Wallace *v.* Kennelly, 47 N. J. L. 242.

[4] See Brewer *v.* Dyer, 7 Cush. 337.

[5] Levering *v.* Langley, 8 Minn. 107; Way *v.* Reed, 6 Allen, 361, 370; Thursby

§ 739. **Effect of surrendering Possession.** — So where, before the expiration of a lease under seal, the lessee actually surrendered possession of the premises to his lessor, who accepted the same and leased them to another, it was held to be, in effect, a surrender.[1] Any acts which are equivalent to an agreement on the part of a tenant to abandon, and on the part of the landlord to resume possession of the demised premises, amount to a surrender of the term by operation of law.[2] But abandoning possession even with notice, unless accepted by the landlord, would not have that effect. The surrender, to be of any effect in barring a claim for rent, must be with the assent of the lessor.[3] So where lessor and lessee, by mutual consent, destroyed the lease for the purpose of making a new one, it was held to have that effect.[4] But to have such an act of the parties amount to a legal surrender, without any writing to that effect, it is necessary that there should be an actual surrendering up by the tenant of the possession of the premises, and an acceptance of such possession by the lessor, such as receiving the key of the house, or actually going into occupation, or putting some other tenant in, or as stated in one of the cases cited above, accepting the tenant of the lessee as his own tenant, and receiving rent from him.[5] The cases upon this point are numerous and often difficult to reconcile, each depending upon the peculiar circumstances upon which the decision turned. But there must be a mutual agreement between the lessor and original lessee, that the lease is terminated, in

v. Plant, 1 Wms. Saund. 240. But if the lessee's term has expired, accepting rent from his assignee discharges him, Lodge *v.* White, 30 Ohio St. 569; and where lessor accepted rent from an assignee who had changed the agreed character of the premises, the lessee was discharged, Fifty Assoc. *v.* Grace, 125 Mass. 161.

[1] Dodd *v.* Acklom, 6 Mann. & G. 672; Grimman *v.* Legge, 8 B. & C. 324; Hegeman *v.* McArthur, 1 E. D. Smith, 147; Walker *v.* Richardson, 2 M. & W. 882; Randall *v.* Rich, 11 Mass. 494; Hesseltine *v.* Seavey, 16 Me. 212. See Brady *v.* Peiper, 1 Hilton, 61; Brewer *v.* Dyer, 7 Cush. 337. See *ante*, § 735.

[2] Talbot *v.* Whipple, 14 Allen, 177, 180; Holman *v.* De Lin-River Finley Co., 30 Or. 428; s. c. 47 Pac. Rep. 708.

[3] Stobie *v.* Dills, 62 Ill. 432.

[4] Baker *v.* Pratt, 15 Ill. 568.

[5] Hegeman *v.* McArthur, 1 E. D. Smith, 147; Dodd *v.* Acklom, 6 Mann. & G. 672; Grimman *v.* Legge, 8 B. & C. 324; Thomas *v.* Cook, 2 B. & A. 119; Amory *v.* Kannoffsky, 117 Mass. 351; Hanham *v.* Sherman, 114 Mass. 19.

order to work a surrender. But this may be implied, and need not always be express. It is enough that it is proved, and, when made, the original lessee is no longer liable, and the new tenant, if there be one, is alone responsible.[1] But merely entering upon leased premises, and using them without any consent of the tenant, does not work a surrender, though he may have quit possession of them. It may prevent his claiming rent of the tenant, but that would depend upon the nature and extent of such use.[2] But where it was agreed between the lessor's agent and the lessee that the latter should surrender the premises, and he accordingly did so by delivering up his part of the lease with the key of the premises to the agent, and the lessor entered upon the premises and let them to another, it was held, that though it was not a technical *surrender*, not having been in writing, a court of equity would enjoin the prosecution of a suit for rent after such a transaction.[3] Merely accepting, without objection, notice that the tenant is going to quit at a future time, though followed by an abandonment of the premises or the cancelling of the lease, unless the premises are taken possession of by the lessor, would not amount to a surrender.[4] But where the lease stipulated for the payment of rent quarterly, with a proviso, that, if not paid when due, the lessor might enter and take possession, and the lessor notified the tenant that held under the lessee, that unless he paid the rent of the current quarter, which had in fact been paid, he must quit, and the tenant accordingly abandoned the premises, it was held to be a surrender, and the lessee was thereby discharged

[1] Bedford *v.* Terhune, 30 N. Y. 462–464; Elliott *v.* Aiken, 45 N. H. 30; Hill *v.* Robinson, 23 Mich. 24; Whitehead *v.* Clifford, 5 Taunt. 518; Phene *v.* Popplewell, 12 C. B. N. S. 334, note to Am. ed., and cases cited; Mollett *v.* Brayne, 2 Camp. 103; Matthews *v.* Tobenor, 39 Mo. 115, 119; Deane *v.* Caldwell, 127 Mass. 242. But merely taking the key and even entering to repair is no acceptance of surrender if not so intended. Pier *v.* Carr, 69 Penn. St. 326; Breckman *v.* Twibill, 89 Penn. St. 58; Oastler *v.* Henderson, 2 Q. B. D. 575; Auer *v.* Penn, 99 Penn. St. 370.

[2] Griffith *v.* Hodges, 1 Car. & P. 419.

[3] Stotesbury *v.* Vail, 13 N. J. Eq. 390. So where the lessee gave up the lease and lessor collected rent from the sublessee. Amory *v.* Kannoffsky, 117 Mass. 351.

[4] Johnstone *v.* Hudlestone, 4 B. & C. 922; Schieffelin *v.* Carpenter, 15 Wend. 400; Walker *v.* Richardson, 2 M. & W. 893, per *Bolland*, B.; Jackson *v.* Gardner, 8 Johns. 394, 404.

from liability to pay rent.[1] In some cases it has been held that if the tenant abandons the premises, especially if he has absconded, and the landlord enters upon and occupies or lets them to another, it will operate as a surrender, putting an end to the relation of landlord and tenant, and any right and liability on account of rent.[2] Other cases might be mentioned where the taking possession by the landlord with the acquiescence or assent of the tenant, where the premises were deserted or vacant, has been held to be a surrender in law. In one of these the house was burned, and the tenant remained liable to pay rent by his covenant. Instead of exacting this, the tenant having neglected to rebuild, the landlord went on without objection by the tenant, and rebuilt, and it was held to be a complete defence to an action brought by the tenant to regain his possession.[3] In one case it was held that an agreement in writing not under seal, to surrender an existing lease for years which was under seal, upon failure to perform certain stipulations, might be valid as a contingent surrender, and that a surrender of a term to operate *in futuro* would be good.[4] The law has been summarized thus: "We must consider what is meant by a surrender by operation of law. This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is, by law, afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender." "In such case, it will be observed, there can be no question of *intention*. The surrender is not the result of intention. It takes place independently, and even in spite of intention."[5]

§ 740. **Merger.** — Where a term for years and the immediate reversion meet in one and the same person, in his own right, either by his own act or by act of the law, so that he has the

[1] Patchin *v.* Dickerman, 31 Vt. 666.

[2] Schuisler *v.* Ames, 16 Ala. 73; M'Kinney *v.* Reader, 7 Watts, 123.

[3] Pindar *v.* Ainsley, cited by *Buller*, J., in Belfour *v.* Weston, 1 T. R. 312, Cline *v.* Black, 4 McCord, 431; Wood *v.* Walbridge, 19 Barb. 136.

[4] Allen *v.* Jaquish, 21 Wend. 628. See Roe *v.* York, 5 East, 86.

[5] Lyon *v.* Reed, 13 M. & W. 306. But see Van Rensselaer *v.* Penniman, 6 Wend. 569. As to what such estoppel is, see Nickells *v.* Atherstone, 10 Q. B. 944. See note to Am. ed. 12 C. B. N. S. 343; Bedford *v.* Terhune, 30 N. Y. 453.

full power of alienation of both estates, they will merge.[1] Thus a reconveyance of an entire leasehold estate to the lessor by sundry mesne conveyances merges the term in the fee, though in each of the transfers of the estate a rent was reserved, together with a right of entry for a breach of covenant.[2] And if the purchaser of an estate purchase in a ground rent which is payable out of the estate, such a union of the two would merge the rent, unless the title to the estate should fail, in which case the rent would revive.[3] But an intervening outstanding term for years in another person will prevent their merging.[4]

§ 741. **Merger of Leasehold in Freehold.** — Where the reversion is a freehold estate, it is not difficult to understand how this may happen, however long the term may be, from the nature of freehold and chattel interests as originally understood, the former being of so much higher consideration in the eye of the law than the latter. As where A was tenant for one thousand years, with a reversion in B for life, and A surrendered his term to B, it merged in the freehold of B, and was gone forever, and B would, after such surrender, have only an estate for his own life.[5]

§ 742. **Merger of Leasehold in Leasehold in Reversion.** — But when this comes to be applied to terms and reversions, where they are both for years, and the reader is told that if the immediate term be for one thousand years, and the reversion for five hundred, and the holder of the immediate term surrender to the reversioner, the term of one thousand years is merged and lost in that of five hundred, it is difficult to comprehend the proposition, except as a positive rule of law. And yet such is the case. It grows out of the nature of a reversion, that if the intermediate estate ceases to be interposed between the reversioner and the present enjoyment of his estate as a reversioner, he will hold only in the latter capacity, and con-

[1] Burton, Real Prop. §§ 897, 899; 1 Cruise, Dig. 239; 3 Prest. Conv. 201. But where a lessee acquires only an undivided interest in the fee his term will not merge. Martin *v.* Tobin, 123 Mass. 85.

[2] Smiley *v.* Van Winkle, 6 Cal. 605; Shepard *v.* Spaulding, 4 Met. 416; Liebschutz *v.* Moore, 70 Ind. 142.

[3] Wilson *v.* Gibbs, 28 Penn. St. 151.

[4] Burton, Real Prop. § 898; Crabb, Real Prop. § 2117 *b*.

[5] Wms. Real Prop. 341; 3 Prest. Conv. 196.

sequently, when the intermediate term, however long, was surrendered up to him, it was extinguished, and he held afterwards as such reversioner.[1]

§ 743. **No Merger of Leasehold in Leasehold in Remainder.** — But if the estate which is limited after a present term for years is a remainder instead of a reversion, and the present estate is surrendered or transferred to the holder of the second estate, inasmuch as the second is only to come into enjoyment at the expiration of the first, it will not be a merger and extinguishment of the first, but the person in whom they unite will have the benefit of both terms in succession. Thus where A had an estate for one hundred years, and B an estate in remainder for fifty, and B acquired A's estate, he thereby became, in effect, tenant for one hundred and fifty years.[2]

§ 744. **Merger of Estates held in Different Rights.** — But if the estate accrue in different rights, merger will take place where the accession is by the act of the parties, but not where it is by act of law: thus if an executor who has the reversion in his own right becomes possessed, as executor, of a term for years, the two will not merge;[3] and it is well settled, that if a husband has a freehold in reversion, and his wife acquires a term for years, the term will not merge, although he has the complete power of disposal of such term. And where the husband is the termor and the wife the owner of the reversion in freehold, it is clear the term will not merge in the freehold, since he only holds that in right of his wife.[4] But different opinions have been held where the husband seised of a term in right of his wife purchases the freehold in reversion, whether the term will merge.[5] And it is even said if an executor, holding a term as such, purchases the reversion in fee, the term will merge in the inheritance.[6]

[1] Burton, Real Prop. § 899; Stephens *v.* Bridges, 6 Madd. 66. This would only occur where a lessor having a *freehold* estate made a lease to take effect on the termination of the first lease. It must not be supposed that it could occur as between a lessee and his sublessee.

[2] Cruise, Dig. tit. 39, §§ 40–46; Co. Lit. 273 *b*. See this subject discussed by Preston, 3 Conv. 201.

[3] Burton, Real Prop. § 903; Wms. Real Prop. 342; Clift *v.* White, 15 Barb. 70.

[4] Burton, Real Prop. §§ 901, 902; Wms. Real Prop. 342; Platt *v.* Sleap, Cro. Jac. 275; 3 Prest. Conv. 276; Jones *v.* Davies, 5 Hurlst. & N. 766.

[5] Sugd. Vend. 22; 3 Prest. Conv. 276.

[6] 3 Prest. Conv. 395; Wms. Real Prop. 343.

CHAPTER XXVI.

ESTATES FOR YEARS — LESSEE ESTOPPED TO DENY LESSOR'S TITLE.

§ 745. The rule of estoppel.
746. Rule extended to encroachments of tenant.
747. Rule holds during tenant's possession.
748. Estoppel binding until possession restored.
749. Effect of accepting lease from stranger.
750. Estoppel runs in favor of lessor's heirs and assignees.
751. Exceptions to general rule.
752. Rule not applicable after surrender.
753. Rule not applicable after constructive eviction.
754. Lessee's disclaimer of lessor's title.
755. Rule applies while relation of landlord and tenant lasts.
756. Effect of fraud or mistake.
757. Disclaimer as ground of forfeiture.

§ 745. **The Rule of Estoppel.** — A lessee who has been put into possession of leased premises by a lessor, and has been permitted thereby to occupy them, is not allowed to question his lessor's title in an action brought to recover possession of the premises, or the rent reserved in such demise, or in assumpsit for use and occupation.[1] The policy of the law will not allow a tenant, under such circumstances, to be guilty of a breach of good faith in denying a title, by acknowledging and acting under which he originally obtained, and has been permitted to hold possession of the premises.[2] Thus where a

[1] Delaney *v.* Fox, 2 C. B. N. S. 768; Gray *v.* Johnson, 11 N. H. 411; Pope *v.* Harkins, 16 Ala. 321; Ansley *v.* Longmire, 2 Kerr, 321; Bigler *v.* Furman, 58 Barb. 545; Longfellow *v.* Longfellow, 54 Me. 240; s. c. 61 Me. 590. For the origin and growth of this doctrine of estoppel between lessee and lessor, see 6 Am. L. Rev. 1 *et seq.* See 2 Smith, Lead. Cas. (5th Am. ed.) 656; Smith *v.* Crosland, 106 Penn. St. 413; Hamer *v.* McCall, 121 N. C. 196; s. c. 28 S. E. Rep. 297; Cherokee Strip Live-Stock Asso. *v.* Cass Land Co., 138 Mo. 391; s. c. 40 S. W. Rep. 107.

[2] Cooke *v.* Loxley, 5 T. R. 4; Balls *v.* Westwood, 2 Camp. 11; 2 Dane, Abr. 443; Hodges *v.* Shields, 18 B. Mon. 828; Miller *v.* McBrier, 14 S. & R. 382; Brown *v.* Dysinger, 1 Rawle, 408; Ball *v.* Lively, 2 J. J. Marsh. 181; Dezell *v.* Odell, 3 Hill, 215, 219; Ingraham *v.* Baldwin, 9 N. Y. 45.

lessee, whose duty it was to pay the taxes assessed upon the premises, suffered the same to be sold for default of payment, and purchased the same at a public sale, it was held that he could not set up a title thus acquired against his landlord.[1] But it would have been otherwise if there were no fault on his part in not making payment of the taxes.[2] Nor will it allow him to complain of a want of title in his lessor, so long as he is himself undisturbed.[3]

§ 746. **Rule extended to Encroachments of Tenant.** — [The rule has the important effect of preventing the tenant from claiming that his possession is hostile to the landlord, thereby laying the foundation for acquiring title by adverse possession. It has been extended to cases where a tenant,] while occupying the demised premises, encroached upon adjacent lands, and enclosed portions of them, which he occupied in connection with the premises long enough to acquire a title to the same by limitation, and the question was, whether this should enure to the benefit of the landlord or the tenant.[4] And in all these cases the court held that the holding was to be presumed to be for the benefit of the landlord under whom he held the principal estate, unless the contrary was clearly proved. But this presumption may be controlled by evidence. As where "the tenant conveys it (the parcel encroached) to another person, and the conveyance is communicated to the landlord, then it can no longer be considered as part of the holding."[5] And where a tenant occupied a parcel of an-

[1] Haskell *v.* Putnam, 42 Me. 244; Smith *v.* Specht, 58 N. J. E. 47; s. c. 42 Atl. Rep. 599. And even if the tenant be under no obligation to pay the taxes, if, while in arrears for rent, he purchase at a tax sale, the presumption would be that he paid the taxes out of the rent due. Gaskins *v.* Blake, 27 Miss. 675. There is, moreover, a strong tendency in the modern decisions to treat a tenant who is not estopped in law to set up a tax title against his landlord, as a trustee for the landlord — as having merely a lien on the property to the extent of the amount paid and interest. Waggener *v.* McLaughlin, 33 Ark. 195; Duffitt *v.* Tuhan, 28 Kan. 292.

[2] Bettison *v.* Budd, 17 Ark. 546; Weichselbaum *v.* Curlett, 20 Kan. 709; Elliott *v.* Smith, 23 Penn. St. 131.

[3] Ankeny *v.* Pierce, Breese, 202; George *v.* Putney, 4 Cush. 351; Vance *v.* Johnson, 10 Humph. 214.

[4] Doe *v.* Jones, 15 M. & W. 580; Doe *v.* Rees, 6 Car. & P. 610; Andrews *v.* Hailes, 2 Ellis & B. 349; Doe *v.* Tidbury, 14 C. B. 304; Lisburne *v.* Davies, L. R. 1 C. P. 259.

[5] Kingsmill *v.* Millard, 11 Exch. 313.

other's land without his permission, and hired and occupied a parcel adjacent to it, and paid rent for it to the owner of the first parcel, and continued this for more than twenty years, it was held that he might, nevertheless, claim to hold the first parcel by adverse possession.[1]

§ 747. **Rule holds during Tenant's Possession.** — All that the law requires is, that, during the time which the tenant actually holds by permission of the landlord, the landlord's title shall not be disputed. In technical phrase, the tenant shall not be allowed to plead, to his landlord's action, *nil habuit in tenementis*.[2] And this would be applied, though the tenant held under a parol demise from a tenant at will; he would be estopped to deny his lessor's title.[3] Upon this general proposition, that a tenant cannot dispute his landlord's title in an action involving that question, the reader is referred to the cases cited below, in addition to those already mentioned, while it will be borne in mind that there are limitations and exceptions to this rule, which will be hereafter referred to.[4]

§ 748. **Estoppel binding until Possession restored.** — Under the older common law and before the development of the modern estoppel *in pais*, the only estoppel of the tenant was where the demise was by indenture. Here he was positively estopped to plead *nil habuit*, etc., even though he might have hired and enjoyed only what was clearly his own land, as would be the case if a disseisor were to demise to his disseisee by indenture.[5] By accepting a lease and becoming a tenant, he admitted the title of his landlord, and thereby pre-

[1] Dixon *v.* Baty, L. R. 1 Exch. 259.

[2] Boston *v.* Binney, 11 Pick. 1, 8; People *v.* Stiner, 45 Barb. 56; *post*, § 756.

[3] Coburn *v.* Palmer, 8 Cush. 124; Hilbourn *v.* Fogg, 99 Mass. 11.

[4] Philip *v.* Robertson, 2 Overt. 399; Robinson *v.* Hathaway, Brayt. 150; Darby *v.* Anderson, 1 Nott & McC. 369; Moore *v.* Beasley, 3 Ohio, 294; Hewit *v.* Lawrence, 2 A. K. Marsh. 366; Moshier *v.* Reding, 12 Me. 478; Lively *v.* Ball, 2 B. Mon. 53; St. Louis *v.* Morton, 6 Mo. 476; Terry *v.* Ferguson, 8 Port. (Ala.) 560; Caldwell *v.* Harris, 4 Humph. 24; Russell *v.* Fabyan, 27 N. H. 529; Williams *v.* Watkins, 3 Pet. 43; Tuttle *v.* Reynolds, 1 Vt. 80; Blight *v.* Rochester, 7 Wheat. 535; Smith, Land. & Ten. 234 (Am. ed.); McCartney *v.* Hunt, 16 Ill. 76; *post*, § 756.

[5] Kempe *v.* Goodall, 2 Ld. Raym. 1154; Heath *v.* Vermeden, 3 Lev. 146; Wilkins *v.* Wingate, 6 T. R. 62; Broom's Maxims, 162; Fletcher *v.* M'Farlane, 12 Mass. 47; Wilson *v.* Townshend, 2 Ves. 693; Miller *v.* Bonsallon, 9 Ala. 317; Vernam *v.* Smith, 15 N. Y. 327; Co. Lit. 47 *b*.

cluded himself from disputing it.[1] But such estoppel only continued during the term of the hiring; after that the lessee might set up his own title against his lessor.[2] Where, however, the lessor was not himself in possession, the lessee was not estopped, by a mere written agreement to hold for a certain time and pay rent, to plead *nil habuit* to an action for rent.[3] But the modern rule is equally imperative in actions for use and occupation where the demise is by parol, and applies as well after as during the term, and where the tenant holds over after the expiration of the term; and continues until possession of the premises is restored to the lessor.[4] So if a tenant under a lease were to convey the estate in fee to a third party, the latter would have no better right to contest the title of the lessor than the lessee himself.[5] And the doctrine is thus broadly stated in one case: "The same estoppel which prevents a tenant from disputing his landlord's title extends to all persons who enter upon premises under a contract for a lease, and to all persons who, by purchase, fraud, or otherwise, obtain possession from such tenant."[6]

[1] Page *v.* Kinsman, 43 N. H. 323; Alwood *v.* Mansfield, 33 Ill. 452.

[2] Co. Lit. 47 *b*; Burt, Real Prop. § 850; Shep. Touch. Preston ed. 53; Jones's Case, Moore, 181; 2 Prest. Abs. 210, 409. In a few modern cases the distinction between this estoppel, which was founded solely on the instrument of demise, beginning and ending with the indenture, and the modern estoppel, which is wholly *in pais*, and continues as long as possession is retained by the tenant, appears to have been overlooked. Carpenter *v.* Thomson, 3 N. H. 204, referred to in Gray *v.* Johnson, 14 N. H. 421; and followed in Page *v.* Kinsman, 43 N. H. 328. See also Acc. Death Ins. Co. *v.* Mackenzie, 10 C. B. N. S. 870; Davis *v.* Tyler, 18 Johns. 490. But that the estoppel outlasts the term is settled by numerous authorities, see following notes.

[3] Chettle *v.* Pound, 1 Ld. Raym. 746; *post*, § 756. See *post*, § 1913.

[4] Binney *v.* Chapman, 5 Pick. 124; Codman *v.* Jenkins, 14 Mass. 93; Shelton *v.* Doe, 6 Ala. 230; Jackson *v.* Stiles, 1 Cow. 575; Falkner *v.* Beers, 2 Doug. (Mich.) 117; Vernam *v.* Smith, 15 N. Y. 327; Lewis *v.* Willis, 1 Wils. 314; Phipps *v.* Sculthorpe, 1 B. & A. 50; Fleming *v.* Gooding, 10 Bing. 549; Miller *v.* Lang, 99 Mass. 13; Delaney *v.* Fox, 2 C. B. N. S. 768; Longfellow *v.* Longfellow, 61 Me. 590; Bonney *v.* Foss, 62 Me. 248; Abbott *v.* Cromartie, 72 N. C. 292; Carson *v.* Broady, 56 Neb. 648; s. c. 77 N. W. Rep. 80; Dasher *v.* Ellis, 102 Ga. 830; s. c. 30 S. E. Rep. 544.

[5] Phillips *v.* Rothwell, 4 Bibb, 33; Den *v.* Gustin, 12 N. J. 42; Turly *v.* Rogers, 1 A. K. Marsh. 245; Jackson *v.* Davis, 5 Cow. 123; Cooper *v.* Smith, 8 Watts, 536; so if the owner in fee takes a lease, Eister *v.* Paul, 54 Penn. St. 196; Campbell *v.* Shipley, 41 Md. 81; Prevot *v.* Lawrence, 51 N. Y. 219; Lucas *v.* Brooks, 18 Wall. 431.

[6] Rose *v.* Davis, 11 Cal. 132; Russell *v.* Erwin, 38 Ala. 44; Lond. & N. W.

But if one, not knowing that the tenant holds a lease, purchases the estate by an absolute deed from the tenant, who has an apparent legal title other than his lease, such purchaser may contest the title of the lessor.[1]

§ 749. **Effect of accepting Lease from Stranger.** — The acceptance of a lease from a third party by a tenant, except as hereafter explained, would be a fraudulent attornment, and cannot prevail against his admission that he entered under the lessor (the plaintiff).[2] So the tenant cannot set up a title adverse to the lessor's, either in himself or a third party, *inconsistent with the lessor's right to grant the original lease*,[3] or impeach the validity of the landlord's title at the time of the commencement of the demise,[4] even though the adverse title may have been gained by the tenant during the continuance of the lease[5] by purchase from a third person;[6] or the lessee was in possession when he accepted the lease.[7] And the principles above stated were adopted in the case of an application by a lessor against the tenant to enjoin him from cutting timber on the premises. The fact of the tenancy was

R. R. *v.* West, L. R. 2 C. P. 553; Stagg *v.* Eureka Co., 56 Mo. 317; *Re* Emery, 4 C. B. N. S. 423, 431; Hentig *v.* Pipher, 58 Kan. 788; s. c. 51 Pac. Rep. 229.

[1] Thompson *v.* Clark, 7 Penn. St. 62.

[2] Jackson *v.* Harper, 5 Wend. 246; Byrne *v.* Breeson, 1 Doug. (Mich.) 179; Allen *v.* Chatfield, 8 Minn. 435; Blanchard *v.* Tyler, 12 Mich. 339.

[3] Reed *v.* Shepley, 6 Vt. 602; Jackson *v.* Stewart, 6 Johns. 34; Syme *v.* Sanders, 4 Strobh. 196; Jackson *v.* Harper, 5 Wend. 246; Chambers *v.* Pleak, 6 Dana, 426; Utica Bk. *v.* Merserean, 3 Barb. Ch. 528; Jackson *v.* Rowland, 6 Wend. 666; Plumer *v.* Plumer, 30 N. H. 558; Hood *v.* Mather, 2 A. K. Marsh. 553; Jackson *v.* Whedon, 1 E. D. Smith, 141; Tondro *v.* Cushman, 5 Wis. 279; Hardisty *v.* Glenn, 32 Ill. 62; Doe *v.* Phillips, 1 Kerr, N. B. 532; Balls *v.* Westwood, 2 Camp. 11; Towne *v.* Butterfield, 97 Mass. 105; Hawes *v.* Shaw, 100 Mass. 187; Doty *v.* Burdick, 83 Ill. 473.

[4] Delaney *v.* Fox, 2 C. B. N. S. 768. See Despard *v.* Walbridge, 15 N. Y. 378; Ritchie *v.* Glover, 56 N. H. 510; Carter *v.* Lee, 51 Ind. 292; where lessor's title was fraudulent, Ripley *v.* Cross, 111 Mass. 41; so Holt *v.* Martin, 51 Penn. St. 499; Stott *v.* Rutherford, 92 U. S. 107; Bedford *v.* Kelly, 61 Penn. St. 491, where lessor was only an agent.

[5] Galloway *v.* Ogle, 2 Binn. 468; Sharpe *v.* Kelley, 5 Denio, 431; Wilson *v.* Smith, 5 Yerg. 379; Drane *v.* Gregory, 3 B. Mon. 619; Elliott *v.* Smith, 23 Penn. St. 131; Clemm *v.* Wilcox, 15 Ark. 102; O'Halloran *v.* Fitzgerald, 71 Ill. 53; Bertram *v.* Cook, 32 Mich. 518.

[6] Marley *v.* Rodgers, 5 Yerg. 217.

[7] McConnell *v.* Bowdry, 4 Mon. 392.

sufficient for the plaintiff without producing evidence of his title to the premises.[1]

§ 750. **Estoppel runs in Favor of Lessor's Heirs and Assigns.** — This doctrine applies as to all persons to whom the title has come from the landlord.[2] But the tenant may show that the ancestor of such heir devised the estate to a third party.[3] So the lessee may show that the reversion was never validly transferred, either from its own nature or the defect of the mode of transfer.[4]

§ 751. **Exceptions to General Rule.** — But broad as might seem the positions above stated, as covering the question of a tenant's right to contest his lessor's title, there are classes of cases where this may be done. Among these are cases where the lessor's title has expired or been extinguished since the lessee's term began, whether by operation of law or the act of the lessor himself; because this is not to dispute the validity of the title under which the tenant entered; and he may concurrently set up any independent title acquired by himself.[5] And as the ten-

[1] Parker *v.* Raymond, 14 Mo. 535.

[2] Russell *v.* Allard, 18 N. H. 222; Tuttle *v.* Reynolds, 1 Vt. 80; Funk *v.* Kincaid, 5 Md. 404; Ingraham *v.* Baldwin, 9 N. Y. 45; Doe *v.* Wiggins, 4 Q. B. 367; *Re* Emery, 4 C. B. N. S. 423, 431; Doe *v.* Austin, 9 Bing. 41.

[3] Despard *v.* Walbridge, 15 N. Y. 374; *post*, § 756.

[4] Gillett *v.* Mathews, 45 Mo. 307; Palmer *v.* Bowker, 106 Mass. 317; Hilbourn *v.* Fogg, 99 Mass. 11; Dunshee *v.* Grundy, 15 Gray, 314; Bergman *v.* Roberts, 61 Penn. St. 497; Whitten *v.* Peacock, 2 Bing. N. C. 411, explained in Gouldsworth *v.* Knights, 11 M. & W. 337. Where the want of title in the lessor appeared on the assignee's own showing, the estoppel was held not to arise. Noke *v.* Awder, Cro. El. 436; Portmore *v.* Bunn, 1 B. & C. 694; Pargeter *v.* Harris, 7 Q. B. 708. Some cases went so far as to hold that when the lessor's title was good only by estoppel, as the assignee must show a title in the lessor capable of transfer, his suit must fail, since the lessee was not estopped where the truth appeared, Lennon *v.* Palmer, 5 Ir. Law, 100, 105; Carvick *v.* Blograve, 1 Brod. & B. 531; but the later cases hold that the assignee need not aver the true title, Cuthbertson *v.* Irving, 4 Hurlst. & N. 742; s. c. 6 id. 135. Where special pleading is abolished or the lease is not under seal, no averment as to the lessor's title is required, and the estoppel is as complete in favor of the assignee as of the lessor. Patten *v.* Deshon, 1 Gray, 325, 326; Rennie *v.* Robertson, 1 Bing. 147. In Hilbourn *v.* Fogg, 99 Mass. 11; Palmer *v.* Bowker, 106 Mass. 317, the title on which the assignee relied, as against the tenant, was not a succession to, but a defeat of, the title of the lessor.

[5] Brudnell *v.* Roberts, 2 Wils. 143; England *v.* Slade, 4 T. R. 682; Walton *v.* Waterhouse, 2 Saund. 418 n.; Smith, Land. & Ten. 234, n.; Doe *v.* Seaton, 2 C. M. & R. 728; Hill *v.* Saunders, 4 B. & C. 529; Franklin *v.* Carter, 1 C. B. 750,

ant may show the determination or extinguishment of the landlord's title after making the lease, as above stated, he may of course show that he has himself become the owner of the land by having purchased the reversion.[1] So where the lessee was induced to accept possession from his lessor by fraud or mistake,[2] [or the lease was void from being prohibited by statute,[3] or the tenant] has been deprived of the possession derived from his lessor, by some one who has a paramount title, or has yielded the same, when claimed, to one having such title, without having procured this to be done, and without violating good faith, he is no longer estopped.[4] And as to the necessity of an actual eviction, the doctrine seems to be now settled, that if a party, having a paramount right to evict the tenant of another who is in occupation of the premises, goes to him claiming to exercise the right to evict him, it would be tantamount to an expulsion, and the landlord's title would thereby be determined, and the possession which the tenant derived from him no longer remain.[5] Thus, if the tenant has been evicted in an action of

757 ; Hopcraft *v.* Keys, 9 Bing. 613 ; Jackson *v.* Rowland, 6 Wend. 666 ; Despard *v.* Walbridge, 15 N. Y. 374 ; Ryerss *v.* Farwell, 9 Barb. 615 ; Hoag *v.* Hoag, 35 N. Y. 469 ; Tilghman *v.* Little, 13 Ill. 239 ; Wild *v.* Serpell, 10 Gratt. 115 ; Giles *v.* Ebsworth, 10 Md. 333 ; Wolf *v.* Johnson, 30 Miss. 513 ; Horner *v.* Leeds, 25 N. J. 106 ; George *v.* Putney, 4 Cush. 354 ; Hilbourn *v.* Fogg, 99 Mass. 11 ; Doe *v.* Edwards, 5 B. & Ad. 1065 ; Franklin *v.* Palmer, 50 Ill. 202 ; Shields *v.* Lozear, 34 N. J. 496 ; Duff *v.* Wilson, 69 Penn. St. 316 ; Smith *v.* Crosland, 106 Penn. St. 413.

[1] Camley *v.* Stanfield, 10 Tex. 546 ; Elliott *v.* Smith, 23 Penn. St. 131 ; George *v.* Putney, 4 Cush. 351 ; Wade *v.* S. Penn. Oil Co., 45 W. Va. 389 ; s. c. 32 S. E. Rep. 169. Thus in Shields *v.* Lozear, 34 N. J. 496, a lessee who holds a mortgage on the demised premises can resist lessor's claim to them from the day the mortgage becomes due. Lausman *v.* Drahos, 10 Neb. 172 ; s. c. 1 N. W. Rep. 956, is *contra*, but is to be supported, if at all, on the ground that the sale was invalid. See Thrall *v.* Omaha Hotel Co., 5 Neb. 295.

[2] Hockenbury *v.* Snyder, 2 Watts & S. 240 ; Miller *v.* Bonsall, 9 Am. 317 ; Jackson *v.* Spear, 7 Wend. 401 ; Thayer *v.* United Bro., 20 Penn. St. 60 ; Tison *v.* Yawn, 15 Ga. 491 ; Alderson *v.* Miller, 15 Gratt. 279 ; Cross *v.* Freeman, 19 Tex. C. A. 428 ; s. c. 47 S. W. Rep. 473 ; *post*, § 756.

[3] Mays *v.* Cherokee Strip Live-Stock Asso., 58 Kan. 712 ; s. c. 5 Pac. Rep. 215.

[4] Simers *v.* Saltus, 3 Denio, 214 ; Whalin *v.* White, 25 N. Y. 462, 465 ; Evertsen *v.* Sawyer, 2 Wend. 507 ; Kane Co. *v.* Herrington, 50 Ill. 232 ; Poole *v.* Whitt, 15 M. & W. 571.

[5] Poole *v.* Whitt, 15 M. & W. 571 ; Delaney *v.* Fox, 2 C. B. n. s. 775, 777 ; Morse *v.* Goddard, 13 Met. 177 ; Simers *v.* Saltus, 3 Denio, 214 ; Whalin *v.* White, 25 N. Y. 462.

ejectment, or yields to such a judgment without actual eviction, he may take a new lease from the plaintiff in ejectment, and thereupon resist the claim of the first lessor, provided he had notice of the pendency of such ejectment suit.[1] But if a tenant yield to a writ of possession which does not run against him or his landlord, and then attorn to the demandant in such writ, he cannot set up this in defence against his landlord.[2] So he cannot buy in a hostile title not asserted against him or his lessor and set it up against the latter.[3] Again, if he be a sub-tenant, he may show that the paramount landlord had entered and dispossessed him and given him a new lease.[4] Or if a tenant of a mortgagor, he may show that the mortgagee has gained possession, and given the lessee notice to pay him the rent.[5] Or that he has purchased the mortgagee's interest, and has given notice to the lessor that he elects to hold under his mortgage.[6] So he may show that the landlord has assigned his title, and that he is therefore bound as tenant to his assignee, since this is not disputing his landlord's title, but showing that he holds under and in accordance with it.[7] So where the assignment is by mortgage.[8] But a tenant cannot attorn to one who has acquired a title hostile to that of the landlord before it is asserted adversely, though it be a better title ; and if he do so, and take a lease from the one to whom he has attorned, promising to pay him rent, he may have to pay both of his lessors, since the privity of estate with his first lessor is not destroyed by such

[1] Foster *v.* Morris, 3 A. K. Marsh. 609 ; Lunsford *v.* Turner, 5 J. J. Marsh. 104 ; Stewart *v.* Roderick, 4 Watts & S. 188 ; Wheelock *v.* Warschauer, 21 Cal. 309.

[2] Calderwood *v.* Pyser, 31 Cal. 333.

[3] Stout *v.* Merrill, 35 Iowa, 47 ; Hawes *v.* Shaw, 100 Mass. 187 ; Ryerson *v.* Eldred, 18 Mich. 12 ; Ronaldson *v.* Tabor, 43 Ga. 230.

[4] Elms *v.* Randall, 2 Dana, 100.

[5] Stedman *v.* Gassett, 18 Vt. 346 ; Magill *v.* Hinsdale, 6 Conn. 464 ; Fitzgerald *v.* Beebe, 2 Eng. (Ark.) 310 ; Welch *v.* Adams, 1 Met. 494 ; Jones *v.* Clark, 20 Johns. 51 ; Joplin *v.* Johnson, 2 Kerr, 543 ; Doe *v.* Simpson, 3 Kerr, 194 ; Mass. Hosp. L. I. Co. *v.* Wilson, 10 Met. 126 ; Evans *v.* Elliot, 9 Ad. & E. 342 ; Cook *v.* Johnson, 121 Mass. 326 ; Lucier *v.* Marsales, 133 Mass. 454.

[6] Pierce *v.* Brown, 24 Vt. 165.

[7] Pope *v.* Harkins, 16 Ala. 321, 323.

[8] Kimball *v.* Lockwood, 6 R. I. 138 ; Delaney *v.* Fox, 2 C. B. N. S. 778. See McDevitt *v.* Sullivan, 8 Cal. 592 ; *post*, § 756 ; Mirick *v.* Hoppin, 118 Mass. 582 ; Aldridge *v.* Ribyre, 54 Ind. 182.

attornment, and he is estopped by his lease to deny his second lessor's title.[1]

§ 752. **Rule not applicable after Surrender.** — If the tenant surrenders the possession which he holds of the lessor, or surrenders his lease so that the lessor has a reasonable time and opportunity to retake the possession, the tenant may take a new lease from one claiming adversely to his original lessor, and dispute the title of the latter.[2]

§ 753. **Rule not applicable after Constructive Eviction.** — The result of the numerous cases upon the difficult question of constructive eviction already referred to may, perhaps, be summed up in the proposition, that wherever there is an assertion of a paramount or hostile title in a third person, who has a claim, or right thereby to the possession of the premises, the tenant, in order to prevent being expelled by the holder of that title, to whom he would otherwise be rendering himself liable as a trespasser, may yield the possession if it can be done without any collusion, or bad faith to the lessor, and attorn to or take from such holder of the title a new lease, or he may abandon the possession, and, in either case, he will thereafter not be liable to pay rent to the original lessor, and may resist the lessor's claim to recover possession, by virtue of the new right thereby acquired. But if there is no such assertion of the hostile title, it seems that he ought, in any such case, to give notice to the lessor of his abandoning or holding adverse possession, that he may not take advantage of the confidence reposed in him by the lessor in putting him into possession of the estate, to deprive him of any rights which the lessor had thereby yielded to his keeping.[3] If, therefore, he were to purchase a better title

[1] Bailey *v.* Moore, 21 Ill. 165.

[2] Boyer *v.* Smith, 3 Watts, 449; Reed *v.* Shepley, 6 Vt. 602; Moshier *v.* Reding, 12 Me. 478; Wild *v.* Serpell, 10 Gratt. 405; Lunsford *v.* Turner, 5 J. J. Marsh. 104; Tilghman *v.* Little, 13 Ill. 239; Thayer *v.* Society, etc., 20 Penn. St. 60; Ansley *v.* Longmire, 2 Kerr, 322; Bryan *v.* Winburn, 43 Ark. 28.

[3] Bowser *v.* Bowser, 10 Humph. 49; Ryerss *v.* Farwell, 9 Barb. 615; Lawrence *v.* Miller, 1 Sandf. 516; Casey *v.* Gregory, 13 B. Mon. 505; Devacht *v.* Newsom, 3 Ohio, 57; Wells *v.* Mason, 4 Scam. 84; Perrin *v.* Calhoun, 2 Brev. 218; Morse *v.* Goddard, 13 Met. 177; Wadsworthville School *v.* Meetze, 4 Rich. (S. C.) 50; Poole *v.* Whitt, 15 M. & W. 571; Perkins *v.* Potts, 52 Neb. 110; s. c. 71 N. W. Rep. 1017; Perkins *v.* Potts, 53 Neb. 444; s. c. 73 N. W. Rep. 936; Jenkinson *v.* Winans, 109 Mich. 524; s. c. 67 N. W. Rep. 549; Pence *v.* Williams, 14 Ind.

than that of his lessor, he ought, nevertheless, to surrender possession to his lessor before he seeks to avail himself of his new title against his landlord.[1]

§ 754. **Lessee's Disclaimer of Lessor's Title.** — This subject may be regarded in two aspects, one in its connection with the question of title to the premises in a real action, the other as affecting the tenant's liability in an action for the recovery of rent upon an actual or implied contract. Thus, if the tenant of a lessor give him express notice that he will no longer hold under him, he is regarded as thereby committing an actual disseisin, and the statute of limitations upon an adverse possession would begin to run from the time of such notice. But the principle of repudiating a tenancy without actually surrendering possession does not apply to actions for the recovery of rent, or excuse the tenant from paying it, or from his liability for use and occupation under the contract by which he gained his entry and possession for and during the full term of such occupation. In other words, a party cannot, of his own will, put an end to a contract under which he continues to receive that for which he promised to make compensation.[2] The doctrine, that, after a tenant has expressly disclaimed to hold any longer under his landlord, he has thereby committed an actual disseisin, and may be sued by his landlord in trespass, and the statute of limitations would begin to run as in cases of adverse possession, seems to be sustained by the court in 3 Peters, p. 49, in the position there assumed not only that the lessor may bring ejectment under such circumstances, but "was bound to do so." But so far as the recovery of rent is concerned, the cases seem to concur in holding, that the tenant cannot rely in defence upon a disclaimer of his landlord's title, unless he has been actually evicted, or what was equivalent, and had yielded his possession to one having a better title. And the right to treat a disclaimer as a disseisin is by election upon the part of the lessor alone, as otherwise the tenant, if holding under a long lease which he was desirous of terminating, might by such

App. 86; s. c. 42 N. E. Rep. 494. In Illinois it is required by statute that even in case of constructive eviction the tenant must have given notice to his landlord. Lowe *v.* Emerson, 48 Ill. 160.

[1] Hodges *v.* Shields, 18 B. Mon. 828, 832; *post*, § 756.

[2] Sherman *v.* Champl. Transp. Co., 31 Vt. 162; Perkins *v.* Potts, *supra*.

a disclaimer compel his landlord to oust him by a judgment of court, or be in danger of losing his whole estate by the tenant's holding adversely for the period of limitation.[1]

§ 755. **Rule applies while Relation of Landlord and Tenant lasts.** — But still, if the tenant enters under his lease, and continues to occupy without what would be tantamount to an eviction, he cannot, in an action to recover the rent, show that his lessor had no title when he made his lease, though he may that his title has determined since the making of his lease.[2] Nor could he set up in defence to an action for rent that the lessor holds under a grant which is void as against the creditors of his grantor, because made to defraud them.[3] In other words, the relation of landlord and tenant, when once established, must be dissolved, and the possession restored, or something equivalent thereto done by the tenant before he can set up another title;[4] but there is nothing to hinder a tenant from buying up a title adverse to that of his landlord, and asserting it at the end of his term, after having delivered up possession of the premises,[5] though the mere taking of a lease, unless followed by possession under it, does not operate to estop the lessee from setting up a title adverse to that of his lessor.[6]

§ 756. **Effect of Fraud or Mistake.** — Where the tenant, having

[1] Willison *v.* Watkins, 3 Pet. 43, 48, 49; Doe *v.* Smythe, 4 M. & S. 347; Doe *v.* Wells, 10 Ad. & E. 427; Zeller *v.* Eckert, 4 How. 289, 296; Jackson *v.* Vincent, 4 Wend. 633, 637; Jackson *v.* Collins, 11 Johns. 1, 5; Greene *v.* Mayow, 9 Vt. 37; North *v.* Barnum, 10 Vt. 220; Hall *v.* Dewey, 10 Vt. 593; Duke *v.* Harper, 6 Yerg. 280, 286, 287; Fusselman *v.* Worthington, 14 Ill. 135; Wall *v.* Goodenough, 16 Ill. 415; Fishar *v.* Prosser, Cowp. 217; Peyton *v.* Stith, 5 Pet. 484; Wilson *v.* Weathersby, 1 Nott & McC. 373; Blight *v.* Rochester, 7 Wheat. 543, 547; Doe *v.* Reynolds, 27 Ala. 364; Delancey *v.* Ganong, 9 N. Y. 9; Jones *v.* Clark, 20 Johns. 62.

[2] Sneed *v.* Jenkins, 8 Ired. 27; Den *v.* Ashmore, 22 N. J. 261; Morse *v.* Roberts, 2 Cal. 515; Naglee *v.* Ingersoll, 7 Penn. St. 185; Longfellow *v.* Longfellow, 16 Me. 590; *ante*, § 751; and Syme *v.* Sanders, 4 Strobh. 196, which holds that a tenant cannot show such determination if not evicted himself, is not sustained by authority.

[3] McCurdy *v.* Smith, 35 Penn. St. 108.

[4] Porter *v.* Mayfield, 21 Penn. St. 263; McGinnis *v.* Porter, 20 Penn. St. 80; Thompson *v.* Clark, 7 Penn. St. 62; Brown *v.* Keller, 32 Ill. 151; Russell *v.* Erwin, 38 Ala. 44.

[5] Williams *v.* Garrison, 29 Ga. 503.

[6] Nerhooth *v.* Althouse, 8 Watts, 427; Chettle *v.* Pound, 1 Ld. Raym. 748.

himself title and possession of the land, has been induced by fraud, misrepresentation, or mistake, to take a lease, it seems well settled that he is not bound by the estoppel, and need not restore possession before disputing his landlord's claims.[1] It has, however, been held, in some recent elaborately considered cases, that a bare possession will enable him to do this, and that neither fraud nor mistake need exist.[2] But this doctrine has been considerably limited in the court which declared it,[3] and is not sustained by the general current of authority.[4] An implied recognition of the relation of landlord and tenant by payment or promise of payment of rent, mere acknowledgment, and the like, is less conclusive upon the occupant of land, himself claiming title, than a lease to or express attornment by him.[5] The doctrine of estoppel applies where one is in possession by mere license.[6]

§ 757. **Disclaimer as Ground of Forfeiture.** — [But while the

[1] Doe *v.* Brown, 7 Ad. & E. 447; Gleim *v.* Rise, 6 Watts, 44; Alderson *v.* Miller, 15 Gratt. 279; Givens *v.* Mullinax, 4 Rich. (S. C.) 590; Thayer *v.* United Bro., 20 Penn. St. 60; Knight *v.* Cox, 18 C. B. 645; Cornish *v.* Searell, 8 B. & C. 471; Schultz *v.* Elliott, 11 Humph. 183; Hamilton *v.* Marsden, 6 Binn. 45.

[2] Tewksbury *v.* Magraff, 33 Cal. 237; Franklin *v.* Merida, 35 Cal. 558. But some of the cases cited by the court rest on quite different grounds. Thus Rogers *v.* Pitcher, 6 Taunt. 202, rests on the tenant's right to show the lessor's title determined, whether in the hands of the lessor or of his assignee; and so Fenner *v.* Duplock, 2 Bing. 10; Gregory *v.* Doidge, 3 Bing. 474; Claridge *v.* Mackenzie, 4 Mann. & G. 143. In Brook *v.* Biggs, 2 Bing. N. C. 572; Hopcraft *v.* Keys, 9 Bing. 613; Acc. Death Ins. Co. *v.* Mackenzie, 10 C. B. N. S. 870, the lessor's title never was completed as it had been understood that it should be.

[3] Mason *v.* Wolff, 40 Cal. 246, where it is held not to apply to any of the express obligations of the lease or process founded thereon; Peralta *v.* Ginochio, 47 Cal. 459; Holloway *v.* Galliac, id. 474; Abbey Homest. Assoc. *v.* Willard, 48 Cal. 614, where the burden is held to be on the tenant to show title, and that a bare possession will not relieve him.

[4] McConnell *v.* Bawdry, 4 Mon. 392; Hall *v.* Butler, 10 Ad. & E. 204; Ingraham *v.* Baldwin, 9 N. Y. 45; Prevot *v.* Lawrence, 51 N. Y. 219; Cobb *v.* Arnold, 8 Met. 398; Hogan *v.* Harly, 8 Allen, 525; Miller *v.* Lang, 99 Mass. 13; Hawes *v.* Shaw, 100 Mass. 187; Panton *v.* Jones, 3 Camp. 372; Cooper *v.* Bandy, 1 Bing. N. C. 45; Gravenor *v.* Woodhouse, 2 Bing. 71, where the estoppel was applied, contrary to the dictum in s. c. 1 Bing. 38.

[5] Doe *v.* Barton, 11 Ad. & E. 307; Doe *v.* Francis, 2 Moo. & R. 57; Stokes *v.* McKibbin, 13 Penn. St. 267; Bergman *v.* Roberts, 61 Penn. St. 497; Shelton *v.* Carrol, 16 Ala. 148; Pearce *v.* Nix, 34 Ala. 183; Washington *v.* Conrad, 2 Humph. 562, 565.

[6] Glynn *v.* George, 20 N. H. 114.

tenant is estopped to deny his landlord's title, the effect of such denial, or of a disseisin, or attornment to an adverse claimant, or collusion with him to deliver possession, as between landlord and tenant, and those claiming under such tenant, works a forfeiture, and the landlord may eject the tenant.[1] But the mere conveyance by the lessee would not by itself operate as a disclaimer; it would only operate as an assignment of such estate as the grantor had. This is declared by the statutes of many of the States, and such is the ordinary effect of the forms of conveyance in use in this country.[2]

[1] Smith, Land. & Ten. 233; Willison *v.* Watkins, 3 Peters, 43; Wall *v.* Goodenough, 16 Ill. 415; Greeno *v.* Munson, 9 Vt. 37; Wild *v.* Serjell, 10 Gratt. 405; North *v.* Barnum, 10 Vt. 220; 4 Kent, Com. 106; Fortier *v.* Ballance, 5 Gilm. 41; Doty *v.* Burdick, 83 Ill. 473.

[2] 4 Kent, Com. 106; Doe *v.* Wells, 10 Ad. & E. 427; Abbey Homest. Assoc. *v.* Willard, 48 Cal. 614.

CHAPTER XXVII.

ESTATES FOR YEARS — CONTRACTS FOR FARMING ON SHARES.

§ 758. Letting land on shares.
759. Construction of "farming on shares" contracts.

§ 758. **Letting Land on Shares.** — There are three ways of "letting land on shares," so called, two of which merely bring the landowner and the farmer into contract relations, while the third establishes the relation of landlord and tenant, creating a true estate for years in the farmer. The only importance which the subject has, in this connection, arises from the necessity of determining when a tenancy has been created. This must depend on the construction of the contract between the parties. If their intention as shown by the contract was that the farmer should do certain work as the servant of the landowner, being paid for his services a certain proportion of the crop, the contract was one of hiring and not a demise.[1] If the intention was that the farmer should, as his own master, make the crops, merely having the privilege of going on the land to plant, work, and harvest the crop, which is to be divided, this again creates no tenancy, but the landowner and farmer are tenants in common of the crops. And the mere use of the word "rent" would not control against the intent of the parties as gathered from the whole contract.[2] But if the farmer, in-

[1] Tanner *v.* Hills, 48 N. Y. 662; Steel *v.* Frick, 56 Penn. St. 172; Porter *v.* Chandler, 27 Minn. 301; Jeter *v.* Penn, 28 La. Ann. 230; Hudgins *v.* Wood 72 N. C. 256.

[2] Putnam *v.* Wise, 1 Hill, 234; Chandler *v.* Thurston, 10 Pick. 205; Dinehart *v.* Wilson, 15 Barb. 595; Alwood *v.* Ruckman, 21 Ill. 200; Daniels *v.* Brown, 34 N. H. 454; Edson *v.* Colburn, 28 Vt. 631; Brown *v.* Lincoln, 47 N. H. 469. And the cultivator may assign his interest in such crops, making his assignee co-tenant of them with the landowner. Aiken *v.* Smith, 21 Vt. 172. And where the tenant was to cultivate and bag the hop crop on the farm for the landlord as rent for the farm, it was held that the hops were the sole property of the land-

stead of having a mere license to enter the land, is given the possession of it, then he becomes a tenant, notwithstanding the rent is to be paid in produce,[1] or even in a part of the specific crops raised.[2] In such case, the tenant's interest in the land has all the usual incidents of an estate for years, even to the maintaining of an action of trespass against the landlord,[3] and the entire crop belongs to the lessee until the lessor's part is severed and delivered.[4]

§ 759. **Construction of "Farming on Shares" Contracts.** — The legal effect of the contract, in any case, depends on the intention of the parties.[5] Where the agreement is not explicit, the specification of a single right of one of the parties, or even the use of a word with a technical meaning, must be seized upon to fix the character of the transaction. Thus, if the crops are specifically to belong to the lessee, or his ownership in them is inferentially recognized, as by giving the lessor a lien on them, this indicates a demise.[6] So where it is specified that the

owner. Kelley *v.* Weston, 20 Me. 232. In Reynolds *v.* Pool, 84 N. C. 37, an agreement between the occupier and landowner to share profits was held a partnership, because a division of profits as such necessarily implied this. So Holifield *v.* White, 52 Ga. 567. But other cases have denied this. Brown *v.* Jaquette, 94 Penn. St. 113; Donnell *v.* Harshe, 67 Mo. 170; Musser *v.* Brink, 68 Mo. 242; and the law is clearly otherwise. Williams *v.* Nolen, 34 Ala. 167; Hurd *v.* Darling, 11 Vt. 214; Aiken *v.* Smith, 21 Vt. 172; Lowe *v.* Miller, 3 Gratt. 205; Fernoll *v.* Kent, 4 Gill, 209; Moore *v.* Spruill, 13 Ired. 55; Smyth *v.* Tankersley, 20 Ala. 212; Tripp *v.* Riley, 15 Barb. 333; Otis *v.* Thompson, Hill & Denio, 131; Walls *v.* Preston, 25 Cal. 59, 64; Guest *v.* Opdyke, 31 N. J. 552; Bernal *v.* Hovious, 17 Cal. 541; Creel *v.* Kirkham, 47 Ill. 344; Fiquet *v.* Allison, 12 Mich. 328; Currey *v.* Davis, 1 Houst. 598.

[1] Newcomb *v.* Ramer, 2 Johns. 421, note; Dinehart *v.* Wilson, 15 Barb. 595; Putnam *v.* Wise, 1 Hill, 234. See also Caswell *v.* Districh, 15 Wend. 379. The effect of the three last-cited cases is to overrule Jackson *v.* Brownell, 1 Johns. 267, and Stewart *v.* Doughty, 9 Johns. 108, the latter of which had already been doubted in Aiken *v.* Smith, 21 Vt. 181. But Jackson *v.* Brownell is spoken of with approbation by Bell, J., in Moulton *v.* Robinson, 27 N. H. 553; Herskell *v.* Bushnell, 37 Conn. 43.

[2] Walls *v.* Preston, 25 Cal. 59, 67; Hitchell *v.* Kimbrough, 4 Jones (N. C.), 163; Blake *v.* Coats, 3 Greene (Iowa), 548.

[3] See cases in preceding note. Warner *v.* Abbey, 112 Mass. 355.

[4] Rinehart *v.* Olwine, 5 W. & S. 157, 163; Ream *v.* Harnish, 45 Penn. St. 376; Front *v.* Hardin, 56 Ind. 165.

[5] Dixon *v.* Niccolls, 39 Ill. 372, 384.

[6] Dockham *v.* Parker, 9 Me. 137; Bailey *v.* Fillebrown, 9 Me. 12; Butterfield *v.* Baker, 5 Pick. 522; Fry *v.* Jones, 2 Rawle, 11; Briggs *v.* Thompson, 9 Penn. St.

farmer is to give to the landowner a portion of the crops *as rent*.[1] So where the contract is for a time specified without relation to the crops.[2] So where the landowner's compensation is to be a certain quantity of grain, not confined to the specific crops.[3] Where the letting is for the making of a crop,[4] it has been held to indicate joint tenancy; and so where it was simply a contract for one to make a crop on the other's land, the crop to be divided.[5] Nevertheless, the cases cited must not be taken as establishing it as law that a particular wording effects either demise or tenancy in common of the crops. Every contract must be construed as a whole to ascertain the intention of the parties. Furthermore, different minds may, with equal reason, draw different inferences of intention from the same vague statement in a contract. Hence a great apparent confusion in the reported cases.[6]]

338; Munsell *v.* Carew, 2 Cush. 50. And in such case, though the agreement be that if tenant fail to pay the rent, the crops are to be the lessor's, and he may dispose of them; until they are actually delivered to the lessor, they are subject to sale or attachment as the property of the lessee. Deaver *v.* Rice, 4 Dev. & Bat. 431; Ross *v.* Swaringer, 9 Ired. 481; Kelley *v.* Weston, 20 Me. 232. And the lessee may have trespass against the lessor for entering and taking the crop. Warner *v.* Abbey, 112 Mass. 355.

[1] Hoskins *v.* Rhodes, 1 Gill & J. 266; Hatchell *v.* Kimbrough, 4 Jones (N. C.), 163.

[2] Alwood *v.* Ruckman, 21 Ill. 200.

[3] See § 758.

[4] Caswell *v.* Districh, 15 Wend. 379; Foote *v.* Colvin, 3 Johns. 216; Bradish *v.* Schenck, 8 Johns. 151; Bishop *v.* Doty, 1 Vt. 37; Dinehart *v.* Wilson, 15 Barb. 595; but this test of a single crop has been disregarded in later cases. See Moulton *v.* Robinson, 27 N. H. 550.

[5] Currey *v.* Davis, 1 Houst. 598.

[6] The following recent cases construe particular contracts for farming on shares: Williams *v.* Rogers, 110 Mich. 418; s. c. 68 N. W. Rep. 240; Angell *v.* Egger, 6 N. Dak. 391; s. c. 71 N. W. Rep. 547; Strangeway *v.* Eisenman, 68 Minn. 395; s. c. 71 N. W. Rep. 617; Anderson *v.* Liston, 69 Minn. 82; s. c. 72 N. W. Rep. 52; Willard *v.* Wing, 70 Vt. 123; s. c. 39 Atl. Rep. 632; Ferris *v.* Hoglan, 121 Ala. 240; s. c. 25 So. Rep. 834. In the last case the written contract stated that the premises were leased; yet, upon a construction of the entire instrument, it was held not to be a lease, but a contract of hiring.

CHAPTER XXVIII.

ESTATES FOR YEARS — HOW TERMS PASS UPON LESSEE'S DEATH.

§ 760. Executor's title to decedent's term.
761. Terms devisable.

§ 760. **Executor's Title to Decedent's Term.** — From the chattel character of terms for years, it is hardly necessary to add that they may be devised or disposed of in payment of debts by an executor or administrator, and when devised they pass without any formal assignment.[1] Such term for years passes to the administrator of the lessee for the benefit of his estate, and he cannot give it up, and take a new lease to himself.[2]

§ 761. **Terms devisable.** — And a devise of a term to A for life, with a remainder over to B, would be good as an executory devise, although, theoretically, A's life estate would be large enough to engross the entire term, and leave nothing to pass by the devise of a remainder. Nor could A do anything on his part with the term which would prevent its passing at his death to the remainder-man.[3] But if the devise be to A and the heirs of his body, as there cannot be an estate tail in a chattel, A becomes thereby the absolute owner of the term.[4]

[1] Burton, Real Prop. §§ 931, 932.
[2] Keating *v.* Condon, 68 Penn. St. 75.
[3] Burton, Real Prop. §§ 946, 947.
[4] Burton, Real Prop. § 945.

CHAPTER XXIX.

ESTATES AT WILL.

§ 762. Definition.
763. Arise by agreement — Notice to quit.
764. Their nature at common law.
765. Tenant cannot convey or assign.
766. Estate at will is determinable at will.
767. Nature of the estate.
768. Estovers and emblements as incidents.
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772. Judgment — Paramount title — Insolvency.
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786. Form of vendee's liability, continued.
787. When assumpsit will not lie for rent.
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789. Theory of notice to quit.
790. Notice — Lessors tenants in common.
791. Effect of requiring notice.
792. Length of the notice required.
793. Length of notice, continued.
794. Certain estates at will expire without notice.
795. Notice, when not required.
796. Time notice — Statutory requirement.

§ 762. **Definition.** — An estate at will in lands is that which a tenant has by an entry made thereon under a demise to hold during the joint wills of the parties to the same.[1] It does not

[1] Co. Lit. 55 *a*; Tud. Cas. 10; Smith, Land. & Ten. 16.

arise till actual possession taken by the lessee,[1] and is determinable at the will of either party to the demise.[2] It will arise where no rent is reserved and no time fixed for determining the occupation.[3]

§ 763. **Arise by Agreement — Notice to quit.** — A tenancy at will cannot arise without an actual grant or contract, and when it does arise the tenant is entitled to a reasonable notice of his landlord's wish to terminate the estate before an action can be maintained against him for possession.[4] Thus where the tenancy was to be for five years, unless the lessor should wish to build upon the estate, in which case the lessor was to quit, is not a tenancy at will, but one upon condition, and determinable only by reasonable notice of the lessor to the lessee of his intention to build. And if, without such notice, the lessor enters upon the lessee to build, he would be a trespasser.[5] And where a tenant for life agreed, by parol, with the reversioner that he might occupy with her during her life, it was held to constitute a tenancy at will which she could terminate at any time by giving the notice required by statute in cases of tenancies at will, which, in New Hampshire, is three months.[6] But this agreement may be an implied one, as when A by agreement with B cut the hay on the farm of the latter upon shares, and placed it in B's barn to be divided, he was held to be so far a tenant at will of the premises, that he was at liberty to enter and divide the hay and remove the share belonging to him, without being a trespasser thereby.[7]

§ 764. **Their Nature at Common Law.** — At common law, this was originally the nature of all estates created by demise for an uncertain period of time. The tenant had no certain indefeasible estate, nothing which he could assign,[8] though a release to him of the inheritance would be effectual to vest such inheritance in him, because of the privity there was between

1 Pollock *v.* Kittrell, 2 Taylor (N. C.), 152; 2 Flint. Real Prop. 215.

2 Co. Lit. 55 *a*.

3 Dame *v.* Dame, 38 N. H. 429.

4 Blum *v.* Robertson, 24 Cal. 127; Chamberlin *v.* Donahue, 45 Vt. 50, 55.

5 Shaw *v.* Hoffman, 25 Mich. 162.

6 Leavitt *v.* Leavitt, 47 N. H. 329.

7 White *v.* Elwell, 48 Me. 360.

8 2 Flint. Real Prop. 215; Co. Lit. 57 *a*; id. 270 *b*, n. 223.

him and the lessor.[1] But he could not prescribe for a way or other easement, as appurtenant to the premises held by him, by reason of the inadequacy of his own estate.[2]

§ 765. **Tenant cannot convey or assign.** — A tenant at will has no such interest or estate in the land in his possession that he can convey it, or out of which he can create any estate in another which will avail against the owner of the land. If he lease it, it will be good between him and his lessee so long as he is suffered to enjoy the premises. But if such lessee of the tenant at will be evicted by a superior title, he will be released thereby from rent falling due after such eviction, and may defend against a covenant in his lease by way of recoupment for a breach of his lessor's covenant for quiet enjoyment.[3] If, therefore, a tenant at will assign his interest, the assignment terminates the tenancy, nor can the assignee claim the rights of the tenant at will against the original lessor.[4] The above doctrine is also adopted by the courts of New York, and in the cases cited below. In case of an assignment or demise by a tenant at will and an entry made by his assignee or lessee, the original landlord might enter upon him as a disseisor. He would have no better rights than a tenant at sufferance, and no notice is requisite to determine such a tenancy. The relation of landlord and tenant does not pass to the assignee of the tenant where the tenancy is terminated by the very act of transmission of the possession by the tenant.[5] But if the lessor sue the assignee of the tenant at will for rent, or for use and occupation, he thereby affirms the assignment, and makes the assignee his tenant at will. So if he accept rent from a tenant at sufferance accruing after the determination of the lease.[6]

§ 766. **An Estate at Will is determinable** at the will of either party, although by the agreement creating it it is expressed to be at the will of one only.[7] But where a lease was made to one

[1] Lit. § 460, n. 223; 2 Prest. Abs. 26.

[2] 2 Bl. Com. 265.

[3] Holbrook *v.* Young, 108 Mass. 83, 85.

[4] King *v.* Lawson, 98 Mass. 309, 311; Say *v.* Stoddard, 27 Ohio St. 478.

[5] Reckhow *v.* Schanck, 43 N. Y. 448, 451; Cunningham *v.* Holton, 55 Me. 33, 36; Dingley *v.* Buffum, 57 Me. 381; Hilbourn *v.* Fogg, 99 Mass. 11; Palmer *v.* Bowker, 106 Mass. 317. Cf. Betz *v.* Delbert, 14 W. No. Cas. 360.

[6] Cunningham *v.* Holton, 55 Me. 33, 38; Cunningham *v.* Horton, 57 Me. 420.

[7] 2 Flint. Real Prop. 216; Co. Lit. 55 *a*; Cheever *v.* Pearson, 16 Pick. 272.

and his heirs for the term of one hundred years, at a certain rent, with a right in the lessee, his heirs or assigns, to hold for as much longer time as he chose, at the same rent, it was held in one case to be, on the part of the lessor, a perpetual lease, but on that of the lessee an estate at will, after the expiration of the first-mentioned term.[1] While, in another case, a lease to one at an agreed rent, so long as he chose to occupy, was held to be a lease at will, not only of the lessee, but of the lessor also.[2] This right, moreover, is a mere personal privilege which he cannot assign to another.[3] Still, if a tenant at will were to let the premises to a third party, who should enter upon them under such lease, the latter would not be admitted to impugn the title of his lessor.[4] And if a tenant at will lets a *part* of the premises to a third party, the latter becomes a sub-tenant to the tenant at will, and not his assignee, and therefore not liable to the owner for rent.[5] And though, by virtue of his possession, the tenant may have trespass *quare clausum fregit* against a stranger for an injury to the possession,[6] yet, if he be wrongfully dispossessed and die, his executor cannot maintain the statute process to recover possession of the premises, nor continue an action which the tenant had begun.[7]

§ 767. **Nature of the Estate.** — The estate of the lessor of a tenant at will is not properly a reversion, and therefore such tenant does not owe fealty by reason of his tenancy, nor can a remainder be limited upon an estate at will.[8] In the words of Lord Abinger, "A tenant at will has a mere *scintilla* of interest which a landlord may determine by making a feoffment upon the land with livery, or by a demand of possession."[9]

§ 768. **Estovers and Emblements as Incidents.** — A tenant at will is entitled to estovers, and, as the law is now understood, to emblements, when the tenancy is determined by the land-

[1] Effinger *v.* Lewis, 32 Penn. St. 367.

[2] Doe *v.* Richards, 4 Ind. 374.

[3] Co. Lit. 57 *a*.

[4] Coburn *v.* Palmer, 8 Cush. 124.

[5] Austin *v.* Thomson, 45 N. H. 113.

[6] Hayward *v* Sedgley, 14 Me. 439; Little *v.* Palister, 3 Me. 6; Clark *v.* Smith, 25 Penn. St. 137; 2 Rolle, Abr. 551.

[7] Ferrin *v.* Kenney, 10 Met. 294.

[8] 2 Flint. Real Prop. 222; Burton, Real Prop. 395, n.

[9] Ball *v.* Cullimore, 2 Cr. M. & R. 120.

lord.[1] If a tenant at will plant crops and abandon the premises before they are ripe, he loses them. If the lessor expel him, the lessee may claim them as emblements. Nor can the lessor, by conveying the land with the growing crops, affect the tenant's right to such emblements.[2]

§ 769. **Manner of determining.** — A marked peculiarity of this estate is the manner in which it may be determined; any act or declaration indicating such intention on the part of either party being sufficient to put an end to it. And it may be assumed, that any act or declaration which is inconsistent with a continued, voluntary, and undisturbed relation of landlord and tenant, will determine it.[3]

§ 770. **What Acts of Lessor determine.** — In respect to what acts may be sufficient to put an end to such tenancy, it is stated, in general terms, that "any act done upon the land by the lessor, in assertion of his title to the possession, determines the will."[4] Thus notice to quit,[5] a demand of possession,[6] an entry upon the land, whether tenant is present or not[7] when made known to him,[8] doing any act on the premises for which the lessor would otherwise be liable to an action of trespass at the suit of the tenant,[9] carrying off stone or trees from the premises against tenant's will,[10] making a feoffment on the land to a third party,[11] threatening to take legal measures to recover the

[1] 2 Flint. Real Prop. 216; Co. Lit. 55 *b*; Davis *v.* Thompson, 13 Me. 209; Sherburne *v.* Jones, 20 Me. 70.

[2] Brown *v.* Thurston, 56 Me. 126.

[3] Smith, Land. & Ten. 16; Turner *v.* Doe, 9 M. & W. 643 and note, Am. ed.; Walden *v.* Bodley, 14 Pet. 156.

[4] Ball *v.* Cullimore, 2 C. M. & R. 120; Rising *v.* Stannard, 17 Mass. 281.

[5] Ellis *v.* Paige, 1 Pick. 43; Davis *v.* Thompson, 13 Me. 209.

[6] Doe *v.* M'Kaeg, 10 B. & C. 721; Den *v.* Howell, 7 Ired. 496.

[7] Ball *v.* Cullimore, 3 Cr. M. & R. 120; Curl *v.* Lowell, 19 Pick. 25; Moore *v.* Boyd, 24 Me. 242; Turner *v.* Doe, 9 M. & W. 643. If the act be an entry upon the land, it must be done with an intent to end the lessee's estate, which is to be found by the jury. Holly *v.* Brown, 14 Conn. 255.

[8] Cook *v.* Cook, 28 Ala. 660; Rising *v.* Stannard, 17 Mass. 282; Furlong *v.* Leary, 8 Cush. 409; Mizner *v.* Munroe, 10 Gray, 290, 292; Doe *v.* Thomas, 6 Exch. 854; Pratt *v.* Farrar, 10 Allen, 519.

[9] Turner *v.* Doe, 9 M. & W. 643.

[10] Doe *v.* Turner, 7 M. & W. 226; Co. Lit. 55 *b*.

[11] Ball *v.* Cullimore, 2 C. M. & R. 120; Rising *v.* Stannard, 17 Mass. 282, 286.

land,[1] or selling,[2] or leasing it.[3] And a conveyance of the land by a landlord to a stranger determines a tenancy at will, and changes it into one at sufferance, though made for the express purpose.[4] And a written lease from the lessor to a stranger will have the same effect upon the original tenancy at will.[5] And if one of two tenants at will take a lease of the premises, it determines the lease of his co-tenant, and he may eject him.[6] Upon an alienation by the landlord made known to the tenant, he becomes a tenant at sufferance, and not entitled to any notice to quit, nor to any action against the landlord if he ejects him without unnecessary force. But he would be entitled to reasonable notice to remove himself, his family, and his goods, and to remain or enter for that purpose without being deemed a trespasser, though his estate is determined by the conveyance and notice thereof to him.[7]

§ 771. **The Death of either Party determines** an estate at will.[8] If the lessor dies, the lessee becomes tenant at sufferance,[9] and the personal representative of the deceased lessee has no right to possession after his death.[10] But if there be two lessors or two lessees, the death of one does not determine the tenancy.[11]

§ 772. **Judgment — Paramount Title — Insolvency.** — So it would be determined by a judgment for possession against the

[1] Doe *v.* Price, 9 Bing. 356.

[2] Co. Lit. 55 *b*, 57 *a*; Jackson *v.* Aldrich, 13 Johns. 66; Howard *v.* Merriam, 5 Cush. 563; Kelly *v.* Waite, 12 Met. 300; Alton *v.* Pickering, 9 N. H. 494; Tud. Cas. 15.

[3] Hildreth *v.* Conant, 10 Met. 298. And though lease be to commence at a future time, it determines the tenancy at will as soon as lease takes effect. Tud. Cas. 13; Dinsdale *v.* Iles, T. Raym. 224; Kelly *v.* Waite, 12 Met. 300.

[4] Curtis *v.* Galvin, 1 Allen, 215; McFarland *v.* Chase, 7 Gray, 462; Esty *v.* Baker, 50 Me. 325. See also Young *v.* Young, 36 Me. 133; Winter *v.* Stevens, 9 Allen, 526, 530. Even if the conveyance be of part only of the premises. Emmes *v.* Feely, 182 Mass. 346.

[5] Pratt *v.* Farrar, 10 Allen, 519; Clark *v.* Wheelock, 99 Mass. 14; Arnold *v.* Nash, 126 Mass. 397.

[6] Casey *v.* King, 98 Mass. 503.

[7] Pratt *v.* Farrar, 10 Allen, 519, 521; Low *v.* Elwell, 121 Mass. 309.

[8] James *v.* Dean, 11 Ves. 383; Cody *v.* Quarterman, 12 Ga. 356, 400; Rising *v.* Stannard, 17 Mass. 282; Ferrin *v.* Kenney, 10 Met. 294; Howard *v.* Merriam, 5 Cush. 563; Robie *v.* Smith, 21 Me. 114; Manchester *v.* Doddridge, 3 Ind. 360.

[9] Reed *v.* Reed, 48 Me. 388.

[10] 2 Flint. Real Prop. 217.

[11] Co. Lit. 55 *b*.

lessor in favor of a stranger, or by an entry under a paramount title,[1] or the assignment of the lessor's estate under a process of insolvency against him.[2]

§ 773. **Acts by which the Tenant forfeits** or puts an end to his estate at will are the assignment of his interest to another,[3] or his conveying the land itself.[4] But such an assignment does not, of itself, put an end to the tenancy, unless the landlord has notice of it. Until then, he may treat his lessee as his tenant.[5] So where one hired a house and was to pay rent monthly in advance, and, having failed to do so, quitted without giving a month's notice, it was held that it did not lie in him to determine his tenancy by such failure to pay the rent in advance, without a regular notice, and that he was therefore liable for a month's rent after his abandonment.[6] The lessor may hold the assignee as his tenant liable for rent, or may treat him as a trespasser or disseisor at his election.[7] If a tenant at will abandon the premises, his estate ceases, especially if he declare he will no longer hold them.[8] Although it would seem that a tenant at will cannot be technically chargeable in waste,[9] if he do acts which would be voluntary waste in a tenant for life or years, he may be treated as a trespasser, having forfeited his estate.[10] So if he suffer the land to be set off as his own on an execution against him without disclosing the true owner, his estate is forfeited.[11] If a tenant disclaim

[1] Howard *v.* Merriam, 5 Cush. 563; Hill *v.* Jordan, 30 Me. 367, in which the lessor's mortgagee entered under his mortgage, thereby determining the tenancy at will of his lessee. 2 Flint. Real Prop. 220; Stedman *v.* Gassett, 18 Vt. 346; Hatstat *v.* Packard, 7 Cush. 245; Hemphill *v.* Tevis, 4 Watts & S. 535; Morse *v.* Goddard, 13 Met. 177.

[2] Doe *v.* Thomas, 6 Exch. 854; Tud. Cas. 12.

[3] Cooper *v.* Adams, 6 Cush. 87; Co. Lit. 57 *a*; Tud. Cas. 13; Smith, Land. & Ten. 17; Cole *v.* Lake Co., 54 N. H. 242, 277.

[4] Den *v.* Howell, 7 Ired. 496.

[5] Pinhorn *v.* Souster, 8 Exch. 763, 772; Smith, Land. & Ten. 20; Carpenter *v.* Colins, Yelv. 73.

[6] Sprague *v.* Quinn, 108 Mass. 553.

[7] Overman *v.* Sanborn, 27 Vt. 54; Co. Lit. 57 *a*; Smith, Land. & Ten. 20.

[8] Chandler *v.* Thurston, 10 Pick. 205; Smith, Land. & Ten. 20.

[9] Co. Lit. 57 *a*; Smith, Land. & Ten. 20.

[10] Phillips *v.* Covert, 7 Johns. 1; Daniels *v.* Pond, 21 Pick. 367. But such will not be the effect of committing waste where the statute requires three months notice to quit. Young *v.* Young, 36 Me. 133.

[11] Campbell *v.* Procter, 6 Me. 12.

holding under his lessor, or denies his landlord's title,[1] or do acts inconsistent with his tenure, as if, being in possession, he take a conveyance in fee of the premises from a third person, he will determine his estate at the election of his landlord.[2]

§ 774. **Estopped to deny Landlord's Title.** — But the lessee cannot determine the tenancy so as to deny his lessor's title until he shall have surrendered possession of the leased premises to the lessor, or yielded to an eviction by a title paramount.[3] And the lessor may sue him as a disseisor without an entry or notice, and may maintain an action for a tort as if he had originally entered by wrong.[4] And the same would be the effect of a denial on the part of a tenant, that he held under him to whom he stands in the relation of tenant and landlord.[5]

§ 775. **Tenant has Reasonable Time to remove.** — Notwithstanding the estate of the tenant is wholly determined in the cases above stated, and he has no longer any right to possession of the premises, when it is done by the lessor, the law will not treat the lessee as a trespasser for entering within a reasonable time and removing his effects, nor for removing his emblements when entitled to them.[6] But he would not be allowed, beyond this, a reasonable time to find a new place suitable for his business.[7] And what shall be a reasonable time, in any case, is a question of law to be determined by the court.[8]

§ 776. **Landlord's Remedy against Strangers.** — From the

[1] Woodward *v.* Brown, 13 Pet. 1; Willison *v.* Watkins, 3 Pet. 43; Currier *v.* Earl, 13 Me. 216; Farrow *v.* Edmundson, 4 B. Mon. 605; Duke *v.* Harper, 6 Yerg. 280; Harrison *v.* Middleton, 11 Gratt. 527; Fusselman *v.* Worthington, 14 Ill. 135. See *ante*, § 754.

[2] Sharpe *v.* Kelley, 5 Denio, 431 Isaacs *v.* Gearhart, 12 B. Mon. 231; Bennock *v.* Whipple, 12 Mo. 346.

[3] Towne *v.* Butterfield, 97 Mass. 105.

[4] Russell *v.* Fabyan, 34 N. H. 218.

[5] Sampson *v.* Schaeffer, 3 Cal. 196, 205; Boston *v.* Binney, 11 Pick. 1, 8; Chamberlin *v.* Donahue 45 Vt. 50, 55.

[6] Doe *v.* M'Kaeg, 10 B. & C. 721; 2 Flint. Real Prop. 218; Lit. § 68; Risley *v.* Stannard, 17 Mass. 282; Ellis *v.* Paige, 1 Pick. 43; Turner *v.* Doe, 9 M. & W. 647, note to Am. ed.

[7] Mann *v.* Hughes, 20 Law Rep. 628.

[8] Co. Lit. 56 *b*; Ellis *v.* Paige, 1 Pick. 43. See Pratt *v.* Farrar, 10 Allen, 519, where ten days, and Arnold *v.* Nash, 126 Mass. 397, where two days were so held.

peculiar relation of landlord and tenant to the estate in case of a tenancy at will, the question has been discussed, what would be the landlord's remedy for an injury done by a stranger to the premises while in the occupancy of his tenant, and whether he could maintain trespass *quare clausum fregit.* It has been held that if the injury be a permanent one to the inheritance, such as cutting down trees and the like, such action may be sustained.[1] But this is confined to cases where the tenancy may oe terminated at any moment by the entry of the landlord, and the action cannot be sustained where a time notice to quit is necessary to terminate the tenancy.[2] But in the latter case an action on the case will lie in favor of the lessor.[3]

§ 777. **Tenancy by Express Contract.** — If a tenancy be created by express words, clearly showing the intention and agreement of the parties that it shall be only so long as both parties please, it will constitute an estate at will, although rent be reserved, payable by the year, or aliquot parts of a year.[4] If the tenant at will is to pay rent at certain intervals, and the lessor determines the tenancy between the intervals of payment, he cannot recover for the time the tenant may have occupied subsequent to the last pay-day.[5]

[1] Starr *v.* Jackson, 11 Mass. 519; Hingham *v.* Sprague, 15 Pick. 102. And this idea is favored by Ripley *v.* Yale, 16 Vt. 257; Davis *v.* Nash, 32 Me. 411. In Cushing *v.* Kenfield, 5 Allen, 307, where defendant broke a window, and was held liable to the landlord, the form of the action was waived.

[2] French *v.* Fuller, 23 Pick. 104. This is somewhat remarkable, as in Massachusetts, notwithstanding the statute, such tenancies have all the incidents of strict tenancies at will.

[3] Lienow *v.* Ritchie, 8 Pick. 235. And that trespass would not lie, see Campbell *v.* Arnold, 1 Johns. 511; Clark *v.* Smith, 25 Penn. St. 137. See Starr *v.* Jackson, 11 Mass. 519, n. In Iowa he may maintain trespass by force of statute. Brown *v.* Bridges, 31 Iowa, 138, 145.

[4] 2 Prest. Abs. 25; Richardson *v.* Landgridge, 4 Taunt. 128; Smith, Lead. Cas. 75; Tud. Cas. 15; Smith, Land. & Ten. 23, n.; Doe *v.* Cox, 11 Q. B. 122; 2 Flint. Real Prop. 215; Humphries *v.* Humphries, 3 Ired. 362; Doe *v.* Davies, 7 Exch. 89; Sullivan *v.* Enders, 3 Dana, 66; Elliott, *v.* Stone, 1 Gray, 571. In both Doe *v.* Cox and Doe *v.* Davies there was an agreement to pay rent quarterly. In Cudlip *v.* Rundall, 4 Mod. 9, the lessor accepted part of the premises described, with permission to the lessee to hold the excepted part when the lessor did not want the same. In Harrison *v.* Middleton, 11 Gratt. 527, the tenant held under a sealed instrument, which contained an agreement to surrender to the lessor's grantee whenever he should choose to take possession.

[5] Cameron *v.* Little, 62 Me. 550; Emmes *v.* Feely, 132 Mass. 346.

§ 778. **Tenancy by Implied Contract.** — The instances of tenancies at will by implication of law are chiefly those where the tenant enters by permission of the owner, for an indefinite period, with some other intention than to create the relation of lessor and lessee.[1] Thus where a householder permitted another to occupy rent free, the tenant was one at will.[2] So where the owners of a dissenters' chapel and dwelling-house placed a minister in the latter as a minister of the congregation.[3] So where the widow of the tenant, from year to year, was suffered to occupy the premises, she paying rent to the lessor, she was held to be tenant at will of the administrator of the deceased tenant.[4]

§ 779. **Under Contracts to purchase.** — Where a person is let into possession under a contract to purchase lands,[5] or take a lease of the same,[6] and it makes no difference whether with or without an agreement to pay interest upon the contract price, his possession is a tenancy at will. But where the owner of land made his bond conditioned to convey it to the obligee upon his paying a certain sum on demand, and interest thereon quarterly, and by the terms of the bond the obligee was in the mean time to retain possession of the premises, it was held to be a demise and not a tenancy at will.[7] Where, however, one,

[1] Jackson *v.* Bradt, 2 Caines, 169.

[2] Rex *v.* Collett, Russ. & Ry. 498.

[3] Doe *v.* M'Kaeg, 10 B. & C. 721. See also Cheever *v.* Pearson, 16 Pick. 266.

[4] Doe *v.* Wood, 14 M. & W. 682.

[5] 2 Flint. Real Prop. 216–220; Gould *v.* Thompson, 4 Met. 224; Doe *v.* Chamberlaine, 5 M. & W. 14; Proprietors *v.* McFarland, 12 Mass. 324; Den *v.* Edmonston, 1 Ired. 152; Watkins, Conv. 20, n.; Doe *v.* Miller, 5 Car. & P. 595; Doe *v.* Rock, 1 Car. & M. 549; Jones *v.* Jones, 2 Rich. (S. C.) 542; Glascock *v.* Robards, 14 Mo. 350; Carson *v.* Baker, 4 Dev. 220; Howard *v.* Shaw, 8 M. & W. 118; Jackson *v.* Miller, 7 Cow. 747; Manchester *v.* Doddridge, 3 Ind. 360; Prentice *v.* Wilson, 14 Ill. 91, 93; Dean *v.* Comstock, 32 Ill. 180; Freeman *v.* Headley, 33 N. J. 523; Harris *v.* Frink, 49 N. Y. 24, 32; Dunne *v.* Trustees, 39 Ill. 578.

[6] Smith, Land. & Ten. 18; Tud. Cas. 10; Hamerton *v.* Stead, 3 B. & C. 478; Riseley *v.* Ryle, 11 M. & W. 16; Howard *v.* Shaw, 8 M. & W. 118; Hogan *v.* Johnson, 2 Taunt. 148; Dunne *v.* Trustees, 39 Ill. 578.

[7] White *v.* Livingston, 10 Cush. 259; Cole *v.* Gill, 14 Iowa, 527. In the former case the report finds that "both parties treated the payment as rent." Where, however, the interest is paid merely as such, no tenancy is implied, because the occupant is to remain during such payment. Dakin *v.* Allen, 8 Cush. 33; Dunham *v.* Townsend, 110 Mass. 440.

under a contract to purchase land, entered and occupied it, and the contract was ultimately performed, it was held that he did not thereby become liable to pay rent for use and occupation during the time of his occupancy, although it was for more than a year, and the value of the rent would have been $500. His tenancy was, during that time, of the nature of a tenancy at will.[1] But where a tenant entered under a promise of a written lease which never came, and occupied premises for which he was by the original agreement to pay a certain sum as rent, he was held to be a tenant from year to year, and entitled to a notice of six months, to expire at the end of the year.[2] Entering, however, under a conditional promise to pay rent, does not create a tenancy from year to year. And if a tenant enters under a promise to take a lease of the premises, and he neglects or refuses to take one, he becomes a tenant at will and not from year to year, and a mere demand for possession terminates the tenancy without any other notice.[3]

§ 780. **Possession without Specified Incidents.** —And it may be laid down, generally, that if a person by consent of the owner of land is let into possession without having a freehold interest or any certain term, and without circumstances which would show an intention to create an estate from year to year, he is a tenant at will.[4] [Thus, a parol lease for the life of the owner, without reservation, of rent at stated periods, was void under the statute of frauds, fixed no definite term of occupancy, and created an estate at will.[5]] Nor would it make any difference

[1] Dennett *v.* Penobscot Co., 57 Me. 425, 427 ; Daken *v.* Allen, 8 Cush. 33 ; Woodbury *v.* Woodbury, 47 N. H. 11.

[2] Silsby *v.* Allen, 43 Vt. 172.

[3] Dunne *v.* Trustees, 39 Ill. 578.

[4] Smith, Land. & Ten. 18 ; Richardson *v.* Langridge, 4 Taunt. 128 ; Gould *v.* Thompson, 4 Met. 224 ; Doe *v.* Wood, 14 M. & W. 682 ; 2 Smith, Lead. Cas. 76 ; Tud. Cas. 10.

[5] Barrett *v.* Cox, 112 Mich. 220 ; s. c. 70 N. W. Rep. 446. But this must be distinguished from a like case where a monthly rent is reserved, thereby creating a tenancy from year to year. Corbett *v.* Cochrane, 67 Conn. 570 ; s. c. 35 Atl. Rep. 509. Care must be taken not to confuse tenancies by implication of law for an indefinite time where rent is reserved at regular periods with tenancies where by actual agreement of the parties the estates are terminable at will, and regular rent is reserved. See § 777. The parties may fix the character of the estate by actual contract. But where it is left to the law to determine by implication the character of an estate of indefinite occupancy, the reservation or non-reservation

that the premises are under a prior lease, provided the first lessee does not interfere with the enjoyment by the second. And the lessor may recover of such second lessee for use and occupation of the premises.[1]

§ 781. **Examples.**— Such will be the case if the grantor continue in possession after delivery of his deed to the purchaser;[2] or a judgment debtor continue, after a sale on *fi. fa.*, to hold by consent of the purchaser.[3] But an action for use and occupation will not lie where the tenant holds adversely to the claimant. The title to the premises cannot be tried in this form of action.[4] So where the trustee who has the legal estate suffers the *cestui que trust* to occupy the premises, the latter is considered a tenant at will of the former.[5] And the trustee may have ejectment against his *cestui que trust* to recover possession of the trust property.[6]

§ 782. **Rent not always an Incident.** — But it should not be inferred from the use of the terms "landlord" and "tenant," that a rent is always incident to a tenancy at will. It often depends upon circumstances, whether and in what form such a tenant will be chargeable for the use and occupation of premises in his possession. If, for instance, a purchaser enters under a parol contract of purchase and sale, and the contract fails by the fault of the vendor, he would not be liable to pay for the use and occupation of the premises in the absence of an express agreement to that effect.[7] But it is not necessary that there

of regular rent fixes the character of the estate as a tenancy from year to year or a tenancy at will, as the case may be. Farley *v.* McKeegan, 48 Neb. 237; s. c. 67 N. W. Rep. 161.

[1] Bedford *v.* Terhune, 30 N. Y. 453; Phipps *v.* Sculthorpe, 1 B. & A. 50.

[2] Currier *v.* Earl, 13 Me. 216; Smith, Land. & Ten. 19, n.

[3] Nichols *v.* Williams, 8 Cow. 13.

[4] Kittredge *v.* Peaslee, 3 Allen, 235; Keyes *v.* Hill, 30 Vt. 759; Hogsett *v.* Ellis, 17 Mich. 351.

[5] Tud. Cas. 11; Wms. Real Prop. 325; Pomfret *v.* Windsor, 2 Ves. Sen. 472; Garrard *v.* Tuck, 8 C. B. 231; Melling *v.* Leak, 16 C. B. 652; 2 Prest. Abs. 25.

[6] Matthews *v.* Ward, 10 Gill & J. 443; Jackson *v.* Pierce, 2 Johns. 221; *post*, § 1491.

[7] Winterbottom *v.* Ingham, 7 Q. B. 611; Smith, Land. & Ten. 18; Bell *v.* Ellis, 1 Stew. & P. (Ala.) 294; Little *v.* Pearson, 7 Pick. 301; Tew *v.* Jones, 13 M. & W. (Am. ed.) 14, n.; Howard *v.* Shaw, 8 M. & W. 118; Hough *v.* Burge, 11 Vt. 190; Coffman *v.* Huck, 24 Mo. 496; Harle *v.* McCoy, 7 J. J. Marsh. 318; Sylvester *v.* Ralston, 31 Barb. 286. The court in New York held that a purchaser under the above circumstances had a mere license, without the relation of

should be an express contract to pay and receive rent, in order to create the relation of landlord and tenant.[1]

§ 783. **Vendee, when liable for Rent.** — But if, after a contract for purchase is entirely at an end, the proposed purchaser continues to hold possession, he will be liable as tenant for use and occupation.[2] To hold one who has been in possession of land in an action for use and occupation, there must be a contract express or implied on his part to pay for such use, and during the time of such enjoyment the relation of landlord and tenant must have subsisted between them. At common law, an action for rent would not lie against a tenant at sufferance;[3] but it seems the better opinion that an action for use and occupation would.[4] But where, in the contract for sale, there is an agreement that the vendee may occupy the premises, while the court of Wisconsin hold it doubtful whether he would be liable for use and occupation if he afterwards refuse to complete the purchase, they hold that if by his agreement he was to hold "as tenant at sufferance of the vendor," it so far recognized the relation of landlord and tenant between them that upon failure to perform he was liable for use and occupation.[5] But if once in, he will continue to be liable until the contract is rescinded and the possession surrendered, whether he actually uses the premises or not. As where A hired of B a barn, and locked it up and never occupied it, nor surrendered possession of it to the owner, he was held liable in an action for use and occupation.[6] So if he continues to occupy he

landlord and tenant. Dolittle *v.* Eddy, 7 Barb. 74; Stone *v.* Sprague, 20 Barb. 509. In a case in Connecticut where the purchaser entered and occupied the premises for some years under a written contract to purchase, paying a part of the purchase-money, and then left the premises, and the owner entered upon them, the court held that the plaintiff could not recover for use and occupation, though the defendant alone was in fault for leaving and failing to perform the contract, — on the ground, among other things, that the original contract was still open. Vandenheuvel *v.* Storrs, 3 Conn. 203.

[1] McKissack *v.* Bullington, 37 Miss. 535.

[2] Howard *v.* Shaw, 8 M. & W. 118; Dwight *v.* Cutler, 3 Mich. 566; Hogsett *v.* Ellis, 17 Mich. 351.

[3] Cunningham *v.* Holton, 55 Me. 33, 38; Delano *v.* Montague, 4 Cush. 42; Flood *v.* Flood, 1 Allen, 217

[4] See *post*, § 829 and note.

[5] Wright *v.* Roberts, 22 Wis. 161.

[6] Hall *v.* West. Transp. Co., 34 N. Y. 284; Waring *v.* King, 8 M. & W. 571; Pinero *v.* Judson, 6 Bing. 206.

will be liable, although partially interrupted in his enjoyment of the premises by act of the lessor.[1]

§ 784. **Form of Vendee's Liability.** — If the vendee enter and occupy under an agreement to purchase, and afterwards refuses to carry out the contract, or accept a conveyance, he will be liable to respond in damages, in some form, for such use and occupation of the premises. By some courts he has been held liable in an action of assumpsit, on the ground that he held the premises, beneficially, by permission of the owner, thereby raising an equitable claim for compensation;[2] and the same ground was also taken in an early case cited below.[3]

§ 785. **Form of Vendee's Liability, continued.** — The opposite conclusion was, however, reached by Mansfield, J., who denied that a contract could arise by implication of law, under circumstances the occurrence of which neither of the parties ever had in their contemplation.[4] So far as compensation is concerned, assumpsit is based upon the idea of a contract between the parties. But this contract may be express or implied, provided it be one which creates or recognizes the relation of landlord and tenant, by which the defendant holds possession of the premises under the plaintiff, by an agreement to pay for the use of the same. The questions of difficulty have been where, though the holding may not have been adverse, it had its inception in some other contract than that of hiring, but its character has altered by a change in the relation of the parties to the estate in question. The doctrine upon the subject as held by the United States court is thus stated: If, under a contract to sell, a vendor puts the vendee into possession, the latter holds as licensee, is not tenant of a landlord, and pays nothing for the enjoyment of the estate.[5]

[1] Bost. & W. R. R. *v.* Ripley, 13 Allen, 421.

[2] Gould *v.* Thompson, 4 Met. 224. And the same is assumed to be law, although not the point under consideration, in Clough *v.* Hosford, 6 N. H. 231. See also Alton *v.* Pickering, 9 N. H. 494; and a like doctrine was held in a case where the occupant gained possession by wrong, though not by force, from one who yielded it under a misapprehension of facts. Hull *v.* Vaughan, 6 Pick. 157.

[3] Hearn *v.* Tomlin, Peake's Cases, 192.

[4] Kirtland *v.* Pounsett, 2 Taunt. 145.

[5] Burnett *v.* Caldwell, 9 Wall. 290, 293; Chamberlin *v.* Donahue, 44 Vt. 57, 59; and see Central Mills Co. *v.* Hart, 124 Mass. 123.

But he can no more deny his vendor's title than if he were lessee. And his assignee is bound by the same estoppel as himself. If the vendee fails to pay the purchase-money according to agreement, his possession becomes tortious, and the vendor may have ejectment, without any previous demand or notice.[1] And it seems established by a great preponderance of authority that an action will not lie for use and occupation where the defendant has occupied under an express agreement as to the terms, although such agreement may not be carried out according to its terms, and the occupancy may not conform to it. Thus where A demised premises to B at a rent payable quarterly, and the tenant, by permission of the lessor, quitted possession before the close of a quarter, or the lessor determined the tenancy between rent days, it was held that the lessor could maintain no action for the use of the premises since the last rent day, till the lessee surrendered possession.[2] So where the tenant held under a contract of purchase as vendee, it was held that the law raised no implied promise to pay for the use of the premises.[3] In case of refusal of the occupant in such case to complete the purchase, he may thereafter become liable as a tenant at will. But if the owner refuse, on his part, to execute a deed, he cannot turn the occupancy of the tenant into a lease carrying rent, nor recover possession of the premises in a process against the tenant as a wrongful holder of the same.[4] Nor can the owner of land hold a tenant responsible in this form of action, from the mere fact of his having enjoyed possession of the estate, if the tenant refused to hold the relation to such owner of tenant, as where two persons claimed the estate and the tenant held under one of these, though in fact it belonged to the other.[5]

[1] Burnett *v.* Caldwell, *supra.* See Lawton *v.* Savage, 136 Mass. 111.

[2] Grimman *v.* Legge, 8 B. & C. 324; Nicholson *v.* Munigle, 6 Allen, 215; Fuller *v.* Swett, 6 Allen, 219, n.

[3] Jones *v.* Tipton, 2 Dana, 295; Smith *v.* Stewart, 6 Johns. 46; Bancroft *v.* Wardwell, 13 Johns. 489; Ayer *v.* Hawks, 11 N. H. 148, 154; Sylvester *v.* Ralston, 31 Barb. 286; Dunning *v.* Finson, 46 Me. 546; Winterbottom *v.* Ingham, 7 Q. B. 611; Hadley *v.* Morrison, 39 Ill. 392.

[4] Dunham *v.* Townsend, 110 Mass. 440; and the rule laid down in Gould *v.* Thompson, *supra*, was limited to a liability after refusal.

[5] Keyes *v.* Hill, 30 Vt. 759; Hogsett *v.* Ellis, 17 Mich. 351.

§ 786. **Form of Vendee's Liability, continued** — But the ordinary rule of law in such cases is, that when a purchaser, who has been in possession under a contract to purchase, refuses to perform on his part, the owner's remedy is not in assumpsit, but trespass. By such refusal he is considered as annulling the conditional license under which he entered, and as having entered without license.[1]

§ 787. **When Assumpsit will not lie for Rent.** — And assumpsit for rent clearly would not lie while the contract of sale continued open and undetermined.[2] But where a tenant at will entered under an agreement to pay a certain rent by the year, and the parties afterwards waived that agreement, and then tried to agree upon new terms, but failed, the tenant continuing to occupy the premises, was held liable in a *quantum meruit* for the use of the same.[3]

§ 788. **Vendor, when liable for Rent.** — If the vendor continues to hold possession after a sale of land, in order to make him liable in assumpsit for use and occupation, it must be shown that his occupation was by permission of the purchaser. If he holds without such permission, he is liable only in trespass for mesne profits.[4] Nor would assumpsit for use and occupation lie where the tenant holds under an indenture of lease, even though the lessor, by his own act, has barred himself from recovering rent under such indenture.[5] But where one entered under a lease which was executed by the lessor only, and occupied the premises, he was held not a tenant at

[1] Smith *v.* Stewart, 6 Johns. 46; Bancroft *v.* Wardwell, 13 Johns. 489; Brewer *v.* Conover, 18 N. J. 214; Howard *v.* Shaw, 8 M. & W. (Am. ed.) 123, n., and 12 id. 324, n.; Clough *v.* Hosford, 6 N. H. 231; Bell *v.* Ellis, 1 Stew. & P. (Ala.) 294.

[2] Wiggin *v.* Wiggin, 6 N. H. 298; Johnson *v.* Beauchamp, 9 Dana, 124; Vandenheuvel *v.* Storrs, 3 Conn. 203.

[3] Forbes *v.* Smiley, 56 Me. 174.

[4] Tew *v.* Jones, 13 M. & W. 12, and note to Am. ed.; Tud. Cas. 10; McCombs *v.* Wallace, 66 N. C. 481; Goldsberry *v.* Bishop, 2 Duvall, 143. But where the land has been conveyed, the presumption of a tenancy arises. Sherburne *v.* Jones, 20 Me. 70.

[5] Leishman *v.* White, 1 Allen, 489; North *v.* Nichols, 37 Conn. 375. As to where the action for use and occupation lies where the lease is in writing or under seal, see *ante*, § 711 and note. By Mass. Pub. Stat. c. 121, §§ 3, 5, rent may be recovered against a tenant at sufferance in an action of contract, and plaintiff may use the deed of demise in evidence to prove the amount due.

will, but liable in assumpsit for the rent reserved in the lease.[1]

§ 789. **Theory of Notice to quit.** — From an early period the courts were inclined to protect the interest of the parties against a sudden determination of such tenancies. The tenant who had planted crops was held entitled to them if expelled by his landlord, and had a right to enter, cultivate, and gather them without being subjected to an action of trespass. So he was authorized to enter and remove his effects, within a reasonable time, after the determination of his tenancy.[2] From this the advance was easy to requiring a notice to quit, in all such cases, from the landlord to his tenant, before the right arose actually to expel him. And this principle was adopted as early as the time of Henry VIII.[3] It was obviously an act of justice, also, that the tenant should give notice to the landlord of his intention to quit, that he might have an opportunity to procure a new tenant.[4]

§ 790. **Notice — Lessors Tenants in common.** — Where the lessors are tenants in common, each must notify for himself, nor can one avail himself of a notice by the other.[5] So if several tenants in common make a parol letting, and by the terms in respect to such lessors the letting of one was by way of conditional limitation, although the tenancy as to this one might thereby be determined, as to all the rest, notice would be requisite for that purpose.[6] It is doubtful if one of several lessors can maintain a process against a tenant who holds under him and other lessors who are owners in common, to recover under the statute a portion of the demised premises;[7] although one tenant in common may have a process of forcible entry and detainer against his co-tenant.[8]

[1] Fitton *v.* Hamilton City, 6 Nev. 196 ; Clark *v.* Gordon, 121 Mass. 330 ; Carroll *v.* St. John's Soc., 125 Mass. 565.

[2] Smith, Land. & Ten. 20, 21 ; 2 Flint. Real Prop. 218.

[3] Year Book, 35 Hen. VI. 24, pl. 30 ; 13 Hen. VIII. 15 *b* ; 14 Hen. VIII. 13 ; Doe *v.* Watts, 7 T. R. 83 ; 2 Smith, Lead. Cas. 76 ; Doe *v.* Porter, 3 T. R. 13 ; Cattley *v.* Arnold, 1 Johns. & H. 651, 656.

[4] Kighly *v.* Bulkly, Sid. 338.

[5] Dillon *v.* Brown, 11 Gray, 180 ; Pickard *v.* Perley, 45 N. H. 188 *post* § 809.

[6] Ashley *v.* Warner, 11 Gray, 43.

[7] King *v.* Dickerman, 11 Gray, 481.

[8] Presbrey *v.* Presbrey, 13 Allen, 281

§ 791. **Effect of requiring Notice.** — At first, the courts had no other rule as to notice than that it should be a reasonable one, and the effect was, that, in ordinary cases, an estate at will, instead of being terminable instantly at will, continued till a reasonable notice from one of the parties to the other of his election to determine it.[1]

§ 792. **The Length of the Notice required** to determine a tenancy at will may be fixed by agreement of the parties,[2] or it may be prescribed by statute, as is done in many of the States. It is competent for the parties to a tenancy at will to determine the same by agreement in any way other than by statute notice. Thus it may be by giving a month's notice in writing, if such is the agreement, and in such case the notice need not have reference to the end of a quarter or calendar month.[3] So by the agreement of the parties, the tenancy may be determined upon the happening of some prescribed contingent event, without notice.[4] And if the landlord agree with the tenant that he may quit, though it be by parol, and the tenant accordingly do so without any further notice, his liability to pay rent ceases.[5]

§ 793. **Length of Notice, continued.** — But where there is no agreement nor time fixed by statute as to the length of notice requisite to determine a tenancy at will, it is generally true that it will be sufficient if it be equal to the interval between the times of payment of rent, or the length of the time by which the letting was at first measured, as by the quarter, month, or week.[6]

[1] Smith, Lead. Cas. 76, and note to Am. ed.; Ellis *v.* Paige, 1 Pick. 43; Davis *v.* Thompson, 13 Me. 209; Taylor, Land. & Ten. (8th ed.) § 55 and note. And such seems to be the rule in Vermont. Rich *v.* Bolton, 46 Vt. 84.

[2] 2 Crabb, Real Prop. 425; Doe *v.* Donovan, 1 Taunt. 555; Kemp *v.* Derrett, 3 Camp. 510.

[3] May *v.* Rice, 108 Mass. 150.

[4] Creech *v.* Crockett, 5 Cush. 133; Hollis *v.* Pool, 3 Met. 350; Elliott *v.* Stone, 1 Gray, 571; Thurber *v.* Dwyer, 10 R. I. 355; Ashley *v.* Warner, 11 Gray, 43; Knecht *v.* Mitchell, 67 Ill. 86. Thus where the tenant's occupancy is only so long as he runs a saw-mill, Crawley *v.* Mullins, 48 Mo. 517; or is in lessor's employ, Grosvenor *v.* Henry, 27 Iowa, 269. See also Wood *v.* Beard, 2 Exch. Div. 30; Whetstone *v.* Davis, 34 Ind. 510.

[5] Farson *v.* Goodale, 8 Allen, 202; and Batchelder *v.* Batchelder, 2 Allen, 105, apparently *contra*, is controlled by Davis *v.* Murphy, 126 Mass. 143.

[6] 2 Crabb, Real Prop. 426; Coffin *v.* Lunt, 2 Pick. 70; Right *v.* Darby, 1 T. R.

§ 794. **Certain Estates at Will expire without Notice.** — If a party enter under a parol lease for a term certain, or for a time limited by agreement, as to its duration, by the happening of some event, where, by statute, all parol leases are declared to be estates at will, as is the case in Massachusetts and Maine, or where by the lease itself the estate is an estate at will, such tenancy may still be determined by notice like any estate at will. Yet, if not so determined, it will come to an end without notice at the expiration of the time or the happening of the event.[1] And where, as in the case in the English statutes and those of many of the States, leases for a certain period are excepted from the clause which declares parol leases to be estates at will, and such a lease is made for a definite period within that exception, no notice would be requisite to determine such lease, or would have any effect to determine it if given before the natural expiration.[2] And even if the parol letting be made for such a period of time as is declared by statute to be void or to constitute a mere tenancy at will, though a notice in such case would determine the tenancy before the time fixed by the agreement, it would expire without notice at the end of the time for which the parol lease was to run.[3]

§ 795. **Notice, when not required.** — If by agreement or by construction of the law upon the act of the parties, a tenancy

160; Doe *v.* Raffan, 6 Esp. 4; Prindle *v.* Anderson, 19 Wend. 391; s. c. 23 id. 616; Prickett *v.* Ritter, 16 Ill. 96; Huyser *v.* Chase, 13 Mich. 98; Stoppelkamp *v.* Mangeot, 42 Cal. 316; Skaggs *v.* Elkus, 45 Cal. 154; Hammon *v.* Douglas, 50 Mo. 434, 437. In Steffens *v.* Earl, 40 N. J. 128, the rule is confirmed, though its adoption is elaborately criticised. In such cases in Maine, tenancy may be determined by thirty days' notice in writing. Esty *v.* Baker, 50 Me. 325, 333.

[1] Creech *v.* Crockett, 5 Cush. 133; Howard *v.* Merriam, 5 Cush. 563; Stedman *v.* McIntosh, 4 Ired. 291; 2 Flint. Real Prop. 220; Danforth *v.* Sergeant, 14 Mass. 491; 2 Crabb, Real Prop. 421; McGee *v.* Gibson, 1 B. Mon. 105; Allen *v.* Jaquish, 21 Wend. 628; Overdeer *v.* Lewis, 1 Watts & S. 90; 2 Smith, Lead. Cas. (5th Am. ed.) 180; Hollis *v.* Pool, 3 Met. 350; Fifty Assoc. *v.* Howland, 11 Met. 99; Elliott *v.* Stone, 12 Cush. 174; Secor *v.* Pestana, 37 Ill. 525.

[2] Smith, Land. & Ten. 64; id. 65; Wms. Real Prop. 326; Edge *v.* Strafford, 1 Tyrw. 293; Brown *v.* Keller, 32 Ill. 151.

[3] 2 Flint. Real Prop. 220; People *v.* Rickert, 8 Cow. 226; Larkin *v.* Avery, 23 Conn. 304; Doe *v.* Bell, 5 T. R. 471; Schuyler *v.* Leggett, 2 Cow. 660; Prindle *v.* Anderson, 19 Wend. 391; Tress *v.* Savage, 4 Ellis & B. 36; Doe *v.* Moffatt, 15 Q. B. 257.

becomes one at will though it may have been otherwise originally, no notice to quit is necessary in order to determine it,[1] unless required by statute. So if the relation of landlord and tenant once subsisting is destroyed, no notice is requisite in order that either party should avail himself of his legal remedies.[2] Nor is notice to quit ever necessary unless the relation of landlord and tenant subsists.[3] Thus, if one in possession repudiates the relation of tenant to his landlord, or of vendee to his vendor, if he enters under a contract of purchase and sets up a hostile claim to title, no demand of possession or notice to quit is necessary.[4] So where the tenancy at will is a conditional limitation, and the event happens which determines the tenancy, no notice is requisite. As where the premises were let so long as the tenant kept a good school, and he failed to keep one.[5]

§ 796. **Time Notice — Statutory Requirement.** — [It must not be supposed that a statutory requirement of a time notice to determine a tenancy at will precludes a termination without notice by any act which terminates the relation of landlord and tenant. As clearly explained in a late Maine decision, such statutes refer to a termination by the will and act of the parties and not to the effects of their acts by operation of law. Thus, a tenancy at will is terminated by the alienation of the premises by the landlord without giving the tenant the statutory notice.[6]]

[1] Elliott *v.* Stone, 1 Gray, 571, where the tenant agreed to pay rent in advance, and failed to do so. Jackson *v.* Miller, 7 Cow. 747, where the defendant entered under contract to purchase, and failed to perform on his part. Chilton *v.* Nisbett, 3 Humph. 404; Stone *v.* Sprague, 20 Barb. 509; Dolittle *v.* Eddy, 7 Barb. 74.

[2] Hall *v.* Burgess, 5 B. & C. 332, where the tenant quit at the end of the year, and the landlord before six months let the premises. In Thomas *v.* Cook, 2 B. & A. 119, where the tenant underlet, the landlord, by distraining on the under-tenant, was held to have lost his claim on the tenant, though he had given no notice. Clemens *v.* Broomfield, 19 Mo. 118.

[3] Jackson *v.* Deyo, 3 Johns. 422; Williams *v.* Hensley, 1 A. K. Marsh. 181, where the tenant disclaimed and denied the landlord's title. Tuttle *v.* Reynolds, 1 Vt. 80; Ross *v.* Garrison, 1 Dana, 35; Larned *v.* Clarke, 8 Cush. 29.

[4] Ingraham *v.* Baldwin, 9 N. Y. 45, 46; Brown *v.* Keller, 32 Ill. 151.

[5] Ashley *v.* Warner, 11 Gray, 43; Bolton *v.* Landers, 27 Cal. 104; Smith *v.* Shaw, 16 Cal. 88; Elliott *v.* Stone, 1 Gray, 571; *ante*, § 792.

[6] Seavey *v.* Cloudman, 90 Me. 536; s. c. 38 Atl. Rep. 540.

CHAPTER XXX.

ESTATES FROM YEAR TO YEAR.

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§ 797. **How created.** — Because of the uncertainty of the rule requiring reasonable notice in order to determine a parol lease, and from the circumstance that rent was generally measured by the year, courts, by judicial legislation, early adopted a rule which has been extensively followed in this country, that a general tenancy by a parol lease where rent is to be paid shall be considered as a lease for a year, which can only be determined by a notice for the time of at least six months, terminating at the expiration of the year. And

if the tenant is allowed to hold without such notice into a second year, it will be considered as a holding for such second year, and so on. So that the common mode of designating such estates by parol is as estates from year to year, to continue till either party gives the other the requisite notice to determine it.[1] Where the tenancy is from year to year, or for an uncertain time, in Illinois sixty days' notice is sufficient to determine it. But if it be for less than a month, thirty days is sufficient in the absence of an express agreement upon the subject.[2] In New York if a tenant enters under a parol lease, void as being within the statute of frauds, the landlord must give one month's notice in order to determine it; his tenancy therefore is one from month to month, determinable by notice to quit.[3]

§ 798. **An Agreement to pay Rent is an essential** element of a tenancy from year to year, and the times at which it is payable must have reference to a yearly holding, such as by the year, quarter, or some aliquot part of a year.[4]

§ 799. **How such Tenancy established.** — It will be sufficient to establish a tenancy from year to year, to show an entry under a general letting, or a letting for an indefinite time, and either an agreement to pay rent measured by the year or its aliquot parts, or an actual payment of rent if none was originally fixed and agreed upon; and such tenancy, once established, will continue until determined by notice to quit, or some other sufficient legal cause.[5] It has accordingly been

[1] Smith, Land. & Ten. 21, 22; Wms. Real Prop. 326; 2 Prest. Abs. 25; Tud. Cas. 24; Lesley *v.* Randolph, 4 Rawle, 123; Right *v.* Darby, 1 T. R. 159, per Buller, J.; Ridgley *v.* Stillwell, 28 Mo. 400; Patton *v.* Axley, 5 Jones (N. C.), 440. It is defined by Parke, B., as a "lease for a year certain, with a growing interest during every year thereafter springing out of the original contract and parcel of it." Oxley *v.* James, 13 M. & W. 214.

[2] Secor *v.* Pestana, 37 Ill. 525.

[3] People *v.* Darling, 47 N. Y. 666; 1 R. S. 745, §§ 7, 9; Reeder *v.* Sayre, 70 N. Y. 180; and see *post*, § 799.

[4] Richardson *v.* Landgridge, 4 Taunt. 128; Tud. Cas. 14; Jackson *v.* Bradt, 2 Caines, 169; Doe *v.* Baker, 4 Dev. 220; Roe *v.* Lees, 2 W. Bl. 1173; Williams *v.* Deriar, 31 Mo. 13; Doidge *v.* Bowers, 2 M. & W. 365; Chamberlin *v.* Donahue, 45 Vt. 50; Rich *v.* Bolton, 46 Vt. 84.

[5] Lesley *v.* Randolph, 4 Rawle, 123, 129; Com. Land. & Ten. 7, 8; Squires *v.* Huff, 3 A. K. Marsh. 17; Knight *v.* Benett, 3 Bing. 361; Hamerton *v.* Stead, 3 B. & C. 478, per Littledale, J.; Burton, Real Prop. 396, n.; Lockwood *v.*

held that when the hiring is for a term which is within the statute of frauds, and the lessee enters, it will be regarded as a tenancy from year to year.[1] But the landlord having refused to give a lease, and having denied the tenant's right to occupy, who thereupon quitted, it was held that he was not liable for rent while he did so occupy.[2] A general tenancy in Indiana is one from year to year. It is otherwise, if made for the term of a single year. But the lessor could not determine the lease during the year for non-payment of rent, unless the terms of the hiring contained a condition to that effect.[3] But authorizing one to go upon land and cut wood thereon, at an agreed price per cord, and his entering thereon and cutting and paying for the wood cut for several months in succession, was held not to be a tenancy from year to year, but one at will, nor was the contractor entitled to notice to quit.[4]

§ 800. **How established, continued.** — But where the demise is for one year or other term certain, no notice to quit is necessary,[5] though if the tenant holds over he may be held at

Lockwood, 22 Conn. 425; Roe *v.* Lees, 2 W. Bl. 1173; Hall *v.* Wadsworth, 28 Vt. 412; Hunt *v.* Morton, 18 Ill. 75; Ridgely *v.* Stillwell, 25 Mo. 570; Williams *v.* Deriar, 31 Mo. 13; Crommelin *v.* Thiess, 31 Ala. 412. Thus, where one without authority lets another's land, and the tenant pays rent to owner, it creates a tenancy from year to year. McDowell *v.* Simpson, 3 Watts, 129. Though rent is actually paid, however, it is not conclusive of the fact of a tenancy, — it may be explained by either payer or receiver. Doe *v.* Crago, 6 C. B. 90; Tud. Cas. 15; *contra*, Bishop *v.* Howard, 2 B. & C. 100.

[1] Schuyler *v.* Leggett, 2 Cow. 660; Thomas *v.* Nelson, 69 N. Y. 118; Thurber *v.* Dwyer, 10 R. I. 355; Shepherd *v.* Cummings, 1 Coldw. 354; Reeder *v.* Sayre, 70 N. Y. 180; Laughran *v.* Smith, 75 N. Y. 205. But see *ante*, § 780.

[2] Greton *v.* Smith, 33 N. Y. 245; Lounsberry *v.* Snyder, 31 N. Y. 514.

[3] Brown *v.* Bragg, 22 Ind. 123.

[4] Kitchen *v.* Pridgen, 3 Jones (N. C.), 49. See Denton *v.* Strickland, 3 Jones (N. C.), 61; Funk *v.* Haldeman, 53 Penn. St. 229. So Colchester *v.* Brooke, 7 Q. B. 339, authority to dredge for oysters is a license only and no lease.

[5] Jackson *v.* McLeod, 12 Johns. 182; Cobb *v.* Stokes, 8 East, 358; Logan *v.* Herron, 8 S. & R. 459; Lesley *v.* Randolph, 4 Rawle, 126; Messenger *v.* Armstrong, 1 T. R. 53; Right *v.* Darby, id. 159; *ante*, § 794. In some cases in New York a parol lease for one month, and thereafter for successive months, has been held a lease for fixed terms, expiring each month without notice, People *v.* Schackno, 48 Barb. 551; Gibbons *v.* Dayton, 4 Hun, 451; People *v.* Goelet, 64 Barb. 476; and in others no notice has been required before bringing summary process, even in cases of tenancies from year to year, because not provided by the statute, Park *v.* Castle, 19 How. Pr. 33; Nichols *v.* Williams, 8 Cow. 13; but the right to notice has since been broadly affirmed in the latter class of tenancies, Reeder *v.* Sayre, 70 N. Y. 180; Laughran *v.* Smith, 75 N. Y. 205.

the election of the lessor as tenant for rent at the rate originally reserved, and also by the payment and receipt of rent or other act expressly recognizing the tenancy. Such holding over may be converted into a tenancy from year to year, upon the same terms as the former holding, including amount and times of payment of rent as far as applicable to the situation of the parties.[1] But where the military authority of the country entered upon premises held by a lessee and occupied the same beyond the term of his lease, he was not held liable to his lessor for rent after the expiration of his term.[2]

§ 801. **Effect of Tenant for Years holding over.** — But merely suffering a tenant to hold over without any act of assent on the part of the landlord, unless so long as to raise a legal presumption of a new letting, will not change the holding into a tenancy against the will of the lessor, or prevent his maintaining an action of trespass or ejectment against the tenant as a tort-feasor.[3]

§ 802. **Remedy against Hold-over Tenant.** — But trespass will not lie in favor of a lessor against his tenant for merely holding over, until he shall have entered and regained possession of the premises. And such would be the law before notice to

[1] Jackson *v.* McLeod, 12 Johns. 182; Barlow *v.* Wainwright, 22 Vt. 88; 4 Kent, Com. 112; Conway *v.* Starkweather, 1 Denio, 113; Bedford *v.* McElherron, 2 S. & R. *49; Moshier *v.* Reding, 12 Me. 478; Harkins *v.* Pope, 10 Ala. 493; Wms. Real Prop. 326, n.; Bacon *v.* Brown, 9 Conn. 334; De Young *v.* Buchanan, 10 Gill & J. 149; Whittemore *v.* Moore, 9 Dana, 315; Moore *v.* Beasley, 3 Ohio, 294; Jackson *v.* Salmon, 4 Wend. 327; Laguerenne *v.* Dougherty, 35 Penn. St. 45; Crommelin *v.* Thiess, 31 Ala. 418; Com. Land. & Ten. 354; Brewer *v.* Knapp, 1 Pick. 332; Roe *v.* Ward, 1 H. Bl. 99. And this would be true although the holding be by a sublessee of the tenant, if no new contract has been made with lessor. Dimock *v.* Van Bergen, 12 Allen, 551. But whether merely holding over after a term certain makes the tenant at sufferance a tenant at will at the lessor's election is differently held in different States. The rule in Conway *v.* Starkweather, *supra*, is denied in Massachusetts, Edwards *v.* Hale, 9 Allen, 462, and elsewhere, but is sustained in most of the States. See *post*, § 826.

[2] Constant *v.* Abell, 36 Mo. 174; 14 Am. Law Reg. 443.

[3] Den *v.* Adams, 12 N. J. 99; Conway *v.* Starkweather, 1 Denio, 113; Hemphill *v.* Flynn, 2 Penn. St. 144; Tud. Cas. 17; Whitacre *v.* Symonds, 10 East, 13. And the lessor has a right to hold a tenant at will as trespasser after due notice to quit. Ellis *v.* Paige, 1 Pick. 43; Rising *v.* Stannard, 17 Mass. 282; Danforth *v.* Sargeant, 14 Mass. 491; Vrooman *v.* McKaig, 4 Md. 450; Schuyler *v.* Smith, 51 N. Y. 315.

quit given, in the case of a tenant at will who holds over after the determination of the estate by the death of the lessor.[1]

§ 803. **Incidents of Tenancies from Year to Year.** — A tenancy from year to year, though indeterminate as to duration until notice given, has many of the qualities and incidents of a term for years,[2] and, when notice has been given, the term is regarded as for a definite period, expiring with the time of the notice. It would, among other things, go to the personal representatives of the tenant on his death.[3] It might be assigned.[4] The lessor might be liable to the tenant for trespass *quare clausum*, in the same manner as in case of an estate for years.[5] The lessor and tenant would have the same rights in respect to acts of strangers which they would have in a tenancy for years.[6] And their rights in respect to each other would be the same, in case of a holding over by such a tenant, as in case of an estate for years.[7] And the tenant would be liable for rent, if the premises burned down.[8] The same would be the law in those States where, though the doctrine of tenancy from year to year has not been adopted, a tenancy at will is to be determined by a notice to quit of a definite length of time.[9]

§ 804. **Tenant's Liability for Repairs.** — But such tenants are not bound to make substantial repairs upon the premises, except by express stipulation to that effect.[10] And where a

[1] Co. Lit. 57 *b*; 2 Bl. Com. 150; Turner *v.* Doe, 9 M. & W. 646, and note to Am. ed.

[2] Cattley *v.* Arnold, 1 Johns. & H. 651; Oxley *v.* James, 13 M. & W. 209.

[3] 2 Prest. Abs. 25; Doe *v.* Porter, 3 T. R. 13; Tud. Cas. 15; Cody *v.* Quarterman, 12 Ga. 386; Doe *v.* Wood, 14 M. & W. 682.

[4] Smith, Land. & Ten. 23; 2 Prest. Abs. 25; Botting *v.* Martin, 1 Camp. 317; Pleasant *v.* Benson, 14 East, 234. But in Hemphill *v.* Giles, 66 N. C. 512, the lessor's assignment was held to defeat the tenant's estate.

[5] Moore *v.* Boyd, 24 Me. 242. And this is true of tenancies at will in States where tenancies from year to year do not exist, Dickinson *v.* Goodspeed, 8 Cush. 119, where the tenant at will had trespass against the lessor for entering and cutting off a pump, before giving notice to quit; and see Cunningham *v.* Holton, 55 Me. 33, 38; Same *v.* Horton, 57 Me. 422.

[6] Clark *v.* Smith, 25 Penn. St. 137; Howard *v.* Merriam, 5 Cush. 563; French *v.* Fuller, 23 Pick. 107.

[7] See cases cited above, § 800.

[8] Izon *v.* Gorton, 5 Bing. N. C. 501.

[9] French *v.* Fuller, 23 Pick. 107; Howard *v.* Merriam, 5 Cush. 563.

[10] Gott *v.* Gandy, 2 Ellis & B. 845. But if the tenant holds over under a lease

tenant from year to year erected a dwelling-house upon the premises, under a promise from the lessor to give him the estate, which he failed to do, it was held that he might recover of the lessor for such improvements. But it would be otherwise in the case of a vendee who should make erections on his own account, though the vendor refuse to deliver a deed of the premises according to his verbal agreement to sell and convey the estate.[1] The law upon the subject of repairs, as stated by Mr. Platt, is as follows: "Independently of contract, a tenant from year to year must keep the premises wind and water tight, and make fair and tenantable repairs, as by putting fences in order, or replacing windows or doors that are broken during his occupation, but he is not liable for the mere wear and tear of the premises, nor answerable if they are burned down, nor bound to repair if they become ruinous by any other accident, nor to replace doors and sashes worn out by time, to put a new roof on, or make similar substantial repairs, or what are called general repairs."[2]

§ 805. **The Lessor and Lessee are equally bound to give Notice,** in order to determine a tenancy from year to year.[3]

§ 806. **When Notice to quit has been given, it may be waived,** and the tenancy will in that case be re-established upon its former footing. This waiver may be shown in various ways, such as by the payment and receipt of rent accruing subsequent to the expiration of the notice,[4] or by distraining for such rent,[5] or giving a new notice to quit at a time subsequent to the first.[6] Though in all these cases it is a question of intention, and even the receipt of rent may not be conclu-

providing for such repair, he is presumed to have agreed to continue that obligation. Richardson *v.* Gifford, 1 Ad. & E. 52 : Doe *v.* Amey, 12 Ad. & E. 476; and see *post*, § 824.

[1] Smith *v.* Smith, 28 N. J. L. 216 ; Gillet *v.* Maynard, 5 Johns. 85.

[2] 2 Platt on Leases, 182 ; Brown *v.* Newbold, 44 N. J. L. 266.

[3] Morehead *v.* Watkyns, 5 B. Mon. 228 ; Johnstone *v.* Huddlestone, 4 B. & C. 922 ; Hall *v.* Wadsworth, 28 Vt. 410.

[4] Prindle *v.* Anderson, 19 Wend. 391 ; Goodright *v.* Cordwent, 6 T. R. 219 ; Collins *v.* Canty, 6 Cush. 415 ; Hoff *v.* Baum, 21 Cal. 120. Where, after notice, the landlord accepted the rent due at the time of notice, expressly reserving and not waiving his right under the notice, it was held that the payment did not affect the notice. Kimball *v.* Rowland, 6 Gray, 224.

[5] Zouch *v.* Willingale, 1 H. Bl. 311.

[6] Doe *v.* Palmer, 16 East, 53.

sive, but open to explanation.[1] The mere demand of such rent by the landlord would not, of itself, be a waiver of such notice, but would be competent evidence for the jury to that effect.[2]

§ 807. **How long Tenant liable for Rent.** — The tenant's liability for rent continues till he puts an end to the estate by notice, whether he continue to occupy the premises or not.[3]

§ 808. **Right to Notice forfeited by Waste.** — If a tenant from year to year commit voluntary waste, he forfeits all right to notice to quit, as he thereby determines his estate.[4]

§ 809. **Notice, the Manner and Form of Service.** — The subject of notice, as a mode of determining estates at will and tenancies from year to year, is so important, that it should be presented distinctly by itself. In most respects the same rules apply, except in the matter of time, to notices, which are necessary to determine tenancies from year to year as to tenancies at will.[5] If the demise be by three, notice by two will not be sufficient to lay the foundation for summary proceedings to eject the tenant; all ought to join, each acting in reference to his own share.[6] Such notice will be sufficient if by parol, unless required by agreement of the parties or some

[1] Doe *v.* Humphreys, 2 East, 237, a second notice proved not to be intended to waive the first. Messenger *v.* Armstrong, 1 T. R. 53; Doe *v.* Batten, Cowp. 243, where acceptance of rent was allowed to be explained, as not being intended as a waiver of notice. See also Kimball *v.* Rowland, 6 Gray, 224. But the doctrine of Doe *v.* Batten is denied in Croft *v.* Lumley, 5 Ellis & B. 648, 682; s. c. Ellis, B. & E. 1069; Dendy *v.* Nicholl, 4 C. B. N. S. 376, 379; and acceptance of rent is conclusive evidence of intent to waive. See also Prindle *v.* Anderson, 19 Wend. 394; Goodright *v.* Cordwent, 6 T. R. 219; Jackson *v.* Sheldon, 5 Cow. 448.

[2] Blyth *v.* Dennett, 13 C. B. 178.

[3] Barlow *v.* Wainwright, 22 Vt. 88; Whitney *v.* Gordon, 1 Cush. 266; Hall *v.* Wadsworth, *supra;* Farson *v.* Goodale, 8 Allen, 203; Walker *v.* Furbush, 11 Cush. 366; Withers *v.* Larrabee, 48 Me. 573.

[4] Phillips *v.* Covert, 7 Johns. 1; Perry *v.* Carr, 44 N. H. 120.

[5] Nichols *v.* Williams, 8 Cow. 13; *ante*, § 791. The dictum in this case and Phillips *v.* Covert, *supra*, that the only difference between these tenancies is the right to notice before ejectment, while true of their origin, is not so as to their incidents. *Ante*, § 803. The only point in issue was whether notice was required before summary process under the statute. Park *v.* Castle, 19 How. Pr. 33; Reeder *v.* Sayre, 70 N. Y. 180.

[6] Pickard *v.* Perley, 45 N. H. 195. *Contra*, Doe *v.* Summersett, 1 B. & Ad. 135; Alford *v.* Vickery, 1 Car. & M. 280; Doe *v.* Hughes, 7 M. & W. 139.

statute to be in writing.[1] It must also be direct and express, and not in the alternative, as to quit or do something else. Though where the notice was accompanied with a declaration, that, if the tenant did not quit, the lessor would insist on double rent, — the statutory penalty, — it was held to be a good one.[2]

§ 810. **Notice, the Time.** — Whether a longer or shorter time of notice is required, it must, in order to be binding, clearly indicate the time when the tenancy is to expire, and, of course, must be given a sufficient number of days before the time so indicated.[3]

§ 811. **Notice, when it must expire.** — And the notice must be so made as to expire at the end of the time during which the tenant may lawfully hold; if from year to year, at the end of the year, or if from quarter to quarter, month to month, and the like, it must expire at the end of such quarter, month, and the like.[4] In New York, if the tenancy be at will, a month's notice determines it, although the time fixed for leaving the premises be one day anterior to the full month, provided the landlord do not disturb the tenant until one full month after the service of the notice.[5] Where rent is payable

[1] Tud. Cas. 16; Timmins *v.* Rowlinson, 3 Burr. 1607; s. c. 1 W. Bl. 533; Doe *v.* Crick, 5 Esp. 196. And where the notice was oral, no objection was made to its sufficiency on that account. Hanchet *v.* Whitney, 1 Vt. 311.

[2] Tud. Cas. 16; 2 Crabb, Real Prop. 429; Doe *v.* Jackson, Doug. 175; Doe *v.* Goldwin, 2 Q. B. 143; Smith, Land. & Ten. 237. The same rule was adopted in a recent case, where the tenant was required to pay an increased rent in advance. Ahearn *v.* Bellman, 4 Exch. Div. 201.

[3] Hanchet *v.* Whitney, 1 Vt. 311; Steward *v.* Harding, 2 Gray, 335; Currier *v.* Barker, 2 Gray, 224. And it was held in the last case cited, that this principle applied where a landlord sought to put an end to a lease in writing by notice to quit for non-payment of rent. A notice to quit "on the 11th of October next, or when the tenant's tenancy might expire," was held too uncertain as to its expiration. Mills *v.* Goff, 14 M. & W. 72; Huyser *v.* Chase, 13 Mich. 102; Woodrow *v.* Michael, 13 Mich. 190; Hultain *v.* Munigle, 6 Allen, 220.

[4] Comyn, Land. & Ten. 405; Prescott *v.* Elm, 7 Cush. 346; Gaillard *v.* So. Car. R. R., 2 Rich. (S. C.) 346; Lloyd *v.* Cozens, 2 Ashm. 131; 2 Crabb, Real Prop. 425; Hanchet *v.* Whitney, 1 Vt. 311; Doe *v.* Donovan, 1 Taunt. 555; Doe *v.* Morphett, 7 Q. B. 577; Currier *v.* Barker, 2 Gray, 224; Baker *v.* Adams, 5 Cush. 99; Sanford *v.* Harvey, 11 Cush. 93; Oakes *v.* Monroe, 8 Cush. 282; Johnson *v.* Stewart, 11 Gray, 181; Cunningham *v.* Holton, 55 Me. 33, 38; Same *v.* Horton, 57 Me. 422. See *post*, § 816.

[5] Burns *v.* Bryant, 31 N. Y. 453.

monthly on the first day of the month, notice on the first day of one month to quit on the first of the following month is sufficient.[1]

§ 812. **Notice, Computation of Time.** — If the tenant comes in at the middle of a quarter, and pays rent on the regular quarter-days, his year, in a tenancy from year to year, commences at the first regular quarter-day, and notice to quit must conform to that time.[2] And where different parts of the premises were entered on different days, the tenancy, for purposes of notice, is construed to begin on the day when the principal part of the estate was entered on, which is a question for the jury.[3] But a notice to quit a part only of premises leased together would be bad.[4] And during the pendency of notice to a tenant to quit, his rights are the same as if he held by a written lease, and he may have trespass *qu. cl. freg.* against his own landlord, while, for an injury to the freehold by a stranger, the landlord's remedy would be case instead of trespass.[5]

§ 813. **Notice, Construction of.** — In the interpretation of notice, however, courts are not strict; the notice must be understood in order to be effective; but if the time is so indicated that the party notified will not be misled, it will be sufficient.[6]

[1] Walker *v.* Sharpe, 14 Allen, 43. In this case the court applied literally the well-settled rule that the day to be named in the notice for quitting is the *rent day*, Baker *v.* Adams, 5 Cush. 99 ; Prescott *v.* Elm, 7 Cush, 346 ; although here the rent was payable in advance on the first day of the term. But the rent day is properly the last day of the term, Ackland *v.* Lutley, 9 Ad. & E. 879 ; and if the tenant is notified to quit on a later day, it will be after a new term has begun and too late, Fox *v.* Nathans, 32 Conn. 348; Thurber *v.* Dwyer, 10 R. I. 355 ; Doe *v.* Lea, 11 East, 310, where the notice held good on a lease from Michaelmas was to quit on Michaelmas. In Waters *v.* Young, 11 R. I. 1, and Steffens *v.* Earl, 40 N. J. 128, a contrary conclusion was reached, but in the former case its soundness was doubted and was based mainly on custom.

[2] Doe *v.* Johnson, 6 Esp. 10 ; Doe *v.* Stapleton, 3 Car. & P. 275 ; Sanhill *v.* Franklin, L. R. 10 C. P. 377.

[3] Doe *v.* Snowdon, 2 W. Bl. 1224 ; Doe *v.* Spence, 6 East, 120 ; Doe *v.* Watkins, 7 East, 551 ; Doe *v.* Howard, 11 East, 498; Doe *v.* Hughes, 7 M. & W. 139.

[4] Doe *v.* Archer, 14 East, 245 ; Sanford *v.* Harvey, 11 Cush. 93.

[5] Dickinson *v.* Goodspeed, 8 Cush. 119 ; French *v.* Fuller, 23 Pick. 104.

[6] Smith, Land. & Ten. 237 ; Doe *v.* Morphett, 7 Q. B. 577 ; Sandford *v.* Harvey, 11 Cush. 93 ; Doe *v.* Kightley, 7 T. R. 63. In the latter case, notice in 1795 was given to quit at a time in 1795, already passed, being an obvious mistake for 1796. Doe *v.* Smith, 5 Ad. & E. 350 ; Doe *v.* Hughes, 7 M. & W. 139 ; Granger *v.* Brown, 11 Cush. 191.

Nor will a misdescription of the place invalidate the notice, if the tenant be not thereby misled.[1]

§ 814. **Notice — Party bound by his own Mistake.** — And if the tenant states a day to the lessor's agent as the end of the term, and the lessor's notice conform to that, it will bind the tenant, though he was mistaken in respect to it.[2]

§ 815. **Notice, on whom to be served.** — In respect to the service of the notice, it must be on the landlord's own tenant, and not a sub-tenant of his lessee. The sub-lessee would be bound, so far as legal proceedings for possession of the premises are concerned, by notice to the landlord's lessee.[3] Where the premises let were a shop, and the lessee took a partner, but no new contract was made with the lessor, notice served upon the partner in the absence of the lessee and wife was held sufficient to determine the tenancy at will.[4] And it may either be personal, or, as a general rule, it may be left at the dwelling-house of the tenant with a servant, though it may not be upon the premises.[5] But if merely left upon the premises, it will not be sufficient, unless it appear that it came to the hands of the tenant.[6]

§ 816. **Notice — Tenancies for Periods less than a Year.** — The common law rule, where the tenancy is for the full period of a year, is that the notice must be six months and must expire with the year.[7] Where the period is for a less time so that the tenancy is from quarter to quarter, month to month, week to week, or the like, it is technically a tenancy from year to year; but the rule as to notice is modified so that it must be equal to one of these intervals and must end at the expiration thereof,[8] unless the time is prescribed by statute.

[1] Doe d. Cox *v.* ——, 4 Esp. 185; Doe *v.* Wilkinson, 12 Ad. & E. 743.

[2] Doe *v.* Lambly, 2 Esp. 635.

[3] Pleasant *v.* Benson, 14 East, 234; Roe *v.* Wiggs, 2 Bos. & P. N. R. 330; Hatstat *v.* Packard, 7 Cush. 245; Schilling *v.* Holmes, 23 Cal. 231; Birdsall *v.* Phillips, 17 Wend. 464.

[4] Walker *v.* Sharpe, 103 Mass. 154.

[5] Smith, Land. & Ten. 240 and note; Doe *v.* Danbar, 1 Mood. & M. 10; Jones *v.* Marsh, 4 T. R. 464; Widger *v.* Browning, 2 Car. & P. 523; Tud. Cas. 17.

[6] Doe *v.* Lucas, 5 Esp. 153; Alford *v.* Vickery, 1 Car. & M. 280. In the latter case a notice was put under the tenant's door, but it was shown to have come to his hands before the six months previous to the expiration of the year.

[7] Bessell *v.* Landsberg, 7 Q. B. 638; 2 Flint. Real Prop. 219.

[8] Taylor, Land. & Ten. 50; Right *v.* Darby, 1 T. R. 159; Smith, Land. &

§ 817. **Notice required by Statute.** — [The notice required to terminate these tenancies is now regulated by statute in many of the States; but this must be distinguished from another notice required to be given] as a preliminary to enforcing legal measures to expel the tenant. The former are alone referred to here.*

§ 818. **Accepting Rent after Notice.** — The effect of accepting rent, by the way of reviving a tenancy which has once been forfeited by failure to pay rent, or has been terminated, so far as giving notice may have that effect, seems to be this. If rent is in arrear under a tenancy at will, the landlord may terminate the tenancy by giving the requisite notice without any previous demand of the rent; and should he, after giving such notice, receive the rent so due, he would not thereby revive the lease, if, at the time of receiving the same, he gives notice of his intent not to waive his right to claim the possession of the premises.[1] But if he accepts rent without any such notice of his intent, especially if he accepts rent accruing after the date of such notice, it is considered as a waiver of what he may have done towards terminating the tenancy,[2] which revives upon the former terms.[3]

* Note. — There are in England, and in many of the States, summary methods provided by statute to enable a landlord to recover possession of leased premises, in some, if not all, of which a preliminary notice of a prescribed length of time must be given before commencing proceedings. But as the subject relates to the remedies of landlords rather than to the nature of estates at will, and the rights of landlords and tenants in respect to such estate, it is purposely omitted here. Stat. 1 & 2 Vict. c. 74; Taylor, Land. & Ten. 728 *a* and note; Smith, Land. & Ten. 245, n., Morris' ed.; Mass. Pub. Stat. c. 175; Howard *v.* Merriam, 5 Cush. 563; Granger *v.* Brown, 11 Cush. 191; Sanford *v.* Harvey, 11 Cush. 93; Rooney *v.* Gillespie, 6 Allen, 74; Raynor *v.* Haggard, 18 Mich. 72; Dudley *v.* Lee, 39 Ill. 339; Alexander *v.* Carew, 13 Allen, 70. An eviction of lessee by summary proceedings does not affect his liability for past rent; it only applies to what is future. Johnson *v.* Oppenheim, 55 N. Y. 294.

Ten. 24; Doe *v.* Hazell, 1 Esp. 94; Sanford *v.* Harvey, 11 Cush. 93; Prescott *v.* Elm, 7 Cush. 346; Hollis *v.* Burns, 100 Penn. St. 206; Steffens *v.* Earl, 40 N. J. L. 128; Waters *v.* Williamson, 59 N. J. L. 337; s. c. 36 Atl. Rep. 665.

[1] Kimball *v.* Rowland, 6 Gray, 224.

[2] Tuttle *v.* Bean, 13 Met. 275; Collins *v.* Canty, 6 Cush. 415. See Norris *v.* Morrill, 43 N. H. 218, commenting on the above cases, and maintaining that merely accepting rent accrued before the termination of the tenancy is not a waiver of notice. It seems, after all, a mere question of intent. Farson *v.* Goodale, 8 Allen, 202. But see *ante*, § 806 and note, that the intent will be conclusively implied from the act.

[3] Goodright *v.* Cordwent, 6 T. R. 219.

§ 819. **Of Surrender.** — Another mode of determining estates at will, including estates from year to year, is by surrender, which is substantially a yielding up of possession by the tenant to the lessor, or reversioner, — and this may be legally inferred from the acts of the parties as well as their express words, such as abandoning the premises by the tenant, and the assuming possession thereof by the lessor.[1] But leaving the key with the lessor does not amount to a surrender, if he do not accept it as such.[2]

§ 820. **Lessor's Right to enter.** — If the tenancy is determined by notice, the lessor may, if he please, enter and take possession of the premises by force if necessary.[3] And where the written notice was directed to John, when the tenant's name was Thomas, but was handed to the tenant's wife at the dwelling-house in his absence, commanding the person to whom it was directed to quit the dwelling-house "you now hold under me," it was held to be sufficient; and the time of the notice having expired, and the lessee having failed to remove, the lessor entered in the absence of the lessee, and removed his goods, and fastened the door. It was held that the lessor was justified in so doing, although the goods were injured by remaining exposed to the weather.[4]

§ 821. **Parol Leases under Statute of Frauds.** — It remains to consider the effect of the statutes of frauds upon parol leases, as it will be found that these vary essentially in their provisions in respect to such leases. But it is believed they all, with the exception of New York, agree in this, that if the agreement to let be executory, and not consummated by the lessee's taking possession, it cannot be enforced; if it be by

[1] Comyn, Land. & Ten. 337; Thomas *v.* Cook, 2 B. & Ald. 119; Nickells *v.* Atherstone, 10 Q. B. 944; Whitney *v.* Meyers, 1 Duer, 266; Smith, Land. & Ten. 231, n., Morris's ed.

[2] Withers *v.* Larrabee, 48 Me. 573; Cannan *v.* Hartley, 9 C. B. 635; Walker *v.* Furbush, 11 Cush. 366; Townsend *v.* Alders, 3 E. D. Smith, 560; *ante*, § 735 *et seq.*

[3] Taunton *v.* Costar, 7 T. R. 431; Miner *v.* Stevens, 1 Cush. 482; Meader *v.* Stone, 7 Met. 147; Harvey *v.* Brydges, 14 M. & W. 437; Hyatt *v.* Wood, 4 Johns. 150; Overdeer *v.* Lewis, 1 Watts & S. 90; Mugford *v.* Richardson, 6 Allen, 76; Stevens *v.* Sampson, 59 Me. 568. See *contra*, Newton *v.* Harland, 1 Mann. & G. 644, Coltman, J., dissenting.

[4] Clarke *v.* Keliher, 107 Mass. 406.

parol, the statute prohibits any action upon such a contract.[1] If the lessee takes possession, the question arises whether by the statute of frauds the lease is binding as an agreement at common law or the tenancy under it, is a mere tenancy at will, or the lease, as such, is to be deemed void.

§ 822. **What Parol Leases binding.** — If the lease does not exceed three years from the time of *making*, it is by the English statute 29 Car. II. c. 3, §§ 1, 2, as valid and binding as if no such statute had been enacted.[2] The same is the rule in Georgia, Indiana, Maryland, North Carolina, Pennsylvania, New Jersey, and South Carolina. This term in Florida is two, and in the following States one year: Alabama, Arkansas, California, Connecticut, Delaware, Iowa, Kentucky, Michigan, Mississippi, New York, Nevada, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin. In Maine, Massachusetts, Missouri, New Hampshire, Ohio, and Vermont, all such leases create tenancies at will only.[3]

§ 823. **Lessee's Occupation under Void Lease.** — Although parol leases are, in the cases before enumerated, declared by these statutes mere estates at will, or in some cases void, yet if the lessee enters and occupies, and pays rent under them, he becomes a tenant from year to year in those States where such tenancies are recognized, or a tenant at will in others, with the rights of such tenants as to notice.[4]

§ 824. **Occupation under Void Lease — Rights of Parties.** — And in the cases embraced in the above section, the rights of the parties will be governed by the terms of the original letting, as agreed upon by the parties, so long as the holding continues.[5]

[1] Browne, Stat. Frauds, § 37 ; Edge *v.* Strafford, 1 Tyrw. 293; Larkin *v.* Avery, 23 Conn. 304 ; Delano *v.* Montague, 4 Cush. 42 ; Young *v.* Dake, 5 N. Y. 463.

[2] Bolton *v.* Tomlin, 5 Ad. & E. 856 ; Rawlins *v.* Turner, 1 Ld. Raym. 736.

[3] Browne, Stat. Frauds, 501–532 ; Adams *v.* McKesson, 53 Penn. St. 83 ; Birckhead *v.* Cummings, 33 N. J. 44 ; Morrill *v.* Mackman, 24 Mich. 286; Lobdell *v.* Hall, 3 Nev. 517.

[4] Clayton *v.* Blakey, 8 T. R. 3; McDowell *v.* Simpson, 3 Watts, 129 ; People *v.* Rickhert, 8 Cow. 226; Blumenthal *v.* Bloomingdale, 100 N. Y. 561 ; Dumn *v.* Rothermel, 112 Penn. St. 272 ; Drake *v.* Newton, 23 N. J. 111 ; Lockwood *v.* Lockwood, 22 Conn. 425 ; 2 Smith, Lead. Cas. 76, n., Am. ed.

[5] Browne, Stat. Frauds, § 39; Schuyler *v.* Leggett, 2 Cow. 660; Barlow *v.* Wainwright, 22 Vt. 88; Doe *v.* Bell, 5 T. R. 471 ; Hollis *v.* Pool, 3 Met. 350 ; Currier *v.* Barker, 2 Gray, 224 Betz *v.* Delbert,14 W. No. Cas. 360.

CHAPTER XXXI.

TENANCIES AT SUFFERANCE.

§ 825. Definition.
826. Who is tenant at sufferance.
827. Must grow out of agreement of parties.
828. Tenant estopped to deny landlord's title.
829. Nature of the tenancy.
830. Tenant's possession not adverse.
831. Tenant's assignee's possession adverse.
832. Landlord's right to expel tenant.
833. Tenant not entitled to notice to quit.

§ 825. **Definition.** — When a tenant has come rightfully into possession of lands by permission of the owner, and continues to occupy the same, after the time for which, by such permission, he has a right to hold the same, he is said to be a tenant by sufferance. In the language of the elementary writers, "he is one who comes in by right, and holds over without right."[1] He holds without right, and yet is not a trespasser.[2] Thus where the owner of land brought process of ejectment against the tenant and a judgment was rendered that the tenant should remove by such a time or be expelled, it was held that trespass would not lie against him for retaining possession until the expiration of the time prescribed.[3] But to make one a tenant by sufferance in California and New York, there must be some laches on the part of the owner, in delaying to make entry upon his tenant after the expiration of his term. And in such case he must give his tenant a month's notice to quit before he can enter and remove him, or maintain ejectment

[1] 2 Bl. Com. 150; Co. Lit. 57 *b*; Smith, Land. & Ten. 217; Doe *v.* Hull, 2 D. & R. 38; Russell *v.* Fabyan, 34 N. H. 218; Poole *v.* Engelke, 61 N. J. L. 124; s. c. 38 Atl. Rep. 823.

[2] Uridias *v.* Morrell, 25 Cal. 35.

[3] Campbell *v.* Loader, 3 Hurlst. & C. 520.

against him.[1] But if he demands possession of his tenant who holds over, within a year from the termination of his lease, he may recover possession of his tenant by expelling him without first making a formal entry upon the premises.[2] But this permission must be that of a landlord to a tenant; if it be an occupancy as a mere matter of favor or accommodation, it would not be a tenancy at sufferance.

§ 826. **Who is Tenant at Sufferance.** — Under this class of occupants of land have been included tenants *per auter vie* after the death of the *cestui que vie*,[3] tenants for years whose terms have expired,[4] tenants at will whose estates have been determined by alienation or by death of the lessor,[5] or by the happening of some contingent event upon which the determination of an estate at will depended,[6] undertenants who hold after the expiration of the term of the original lessee,[7] a grantor who agrees to deliver possession by a certain day, and holds over,[8] the lessee of a life tenant who holds over after the life tenant's death,[9] the defendant in a foreclosure suit holding over after foreclosure sale.[10] In short, any one who continues in possession without agreement, after the determination of the particular estate by which he originally gained it.[11] And this, even though the original contract was a written lease which provided for the recovery of rent, *pro rata*, for the time the tenant should hold after the expiration of the lease.[12] Thus, where the lessee underlet, and the tenancy between the origi-

[1] Moore *v.* Morrow, 28 Cal. 554; 2 N. Y. Rev. Stat. (9th ed.) 1818, § 7; Rowan *v.* Lytle, 11 Wend. 616; Smith *v.* Littlefield, 51 N. Y. 539. In Kentucky a tenant for a term of a year or more is at sufferance for ninety days after the term expires. Mendel *v.* Hall, 13 Bush, 232.

[2] Uridias *v.* Morrell, 25 Cal. 35.

[3] Co. Lit. 57 *b*.

[4] Co. Lit. 57 *b*; Jackson *v.* Parkhurst, 5 Johns. 128; 2 Bl. Com. 150; Poole *v.* Engelke, 61 N. J. L. 124; s. c. 38 Atl. Rep. 823.

[5] Co. Lit. 57 *b*; Kinsley *v.* Ames, 2 Met. 29; Benedict *v.* Morse, 10 Met. 223.

[6] Creech *v.* Crockett, 5 Cush. 133; Elliott *v.* Stone, 1 Gray, 571.

[7] Simkin *v.* Ashurst, 1 Cr. M. & R. 261; Smith, Land. & Ten. 25.

[8] Hyatt *v.* Wood, 4 Johns. 150.

[9] Guthman *v.* Vallery, 51 Neb. 824; s. c. 71 N. W. Rep. 734.

[10] Taylor *v.* O'Brien, 19 R. I. 429; s. c. 34 Atl. 739.

[11] Com. Dig. "Estate," I. 1; Burton, Real Prop. § 56; Livingston *v.* Tanner, 12 Barb. 481; 2 Flint. Real Prop. 222; Smith *v.* Littlefield, 51 N. Y. 543.

[12] Edwards *v.* Hale, 9 Allen, 462.

nal parties to the lease was determined by the original lessor, such sub-tenant became thereby a tenant at sufferance to the original lessor.[1] So where husband and wife conveyed land by deed, which deed was void as to the wife, it was held that, although it conveyed the husband's interest for life, the moment he died the purchaser became a tenant at sufferance to the wife. Nor could the tenant purchase in a new title from a third person and set it up against the wife's claim to recover, without first surrendering possession to her.[2]

§ 827. **Must grow out of Agreement of Parties.** — But in order to have a tenancy grow into one by sufferance, it must originally have been created by agreement of the parties, for where one was in, like a guardian, by act of the law, and held after his ward arrived at age, he was a tort-feasor, intruder, abator, or trespasser, and not a tenant at sufferance.[3] It is held in New York and other States that a tenant who holds over after his term has expired may be treated by the lessor as a tenant from year to year or a trespasser, at his option, but that the tenant cannot elect in which capacity he shall be regarded.[4] In Massachusetts and Maine, however, a contrary rule prevails, and the tenant holding over remains at sufferance until he and

[1] Evans *v.* Reed, 5 Gray, 308.

[2] The following cases illustrate some of the propositions of the text: B was tenant for life with a remainder to A, who, acting as his agent, leased the premises to C for three years, he knowing that he acted as agent. B died at the end of one year, and A conveyed the estate to the plaintiff, who sued C for possession. It was held that C's estate determined upon B's death, and that from that time he was tenant at sufferance, and the plaintiff recovered. Page *v.* Wight, 14 Allen, 182. A, owning land, and being about to leave the country, requested B to take charge of it during his absence, and he let it to C. It was held that A's return determined the lease, and that C thereby became a tenant at sufferance. Antoni *v.* Belknap, 102 Mass. 193; and see Griffin *v.* Sheffield, 38 Miss. 359, 390.

[3] Co. Lit. 57 *b*; 2d Inst. 134; Merrill *v.* Bullock, 105 Mass. 491; Torrey *v.* Torrey, 14 N. Y. 430. But where husband and wife were living on his land which was mortgaged, and he absconded, and she held over after a foreclosure sale, she was held to be a tenant at sufferance. Taylor *v.* O'Brien, 19 R. I. 429; s. c. 34 Atl. Rep. 739.

[4] Conway *v.* Starkweather, 1 Denio, 113; Witt *v.* New York, 5 Rob. 248; s. c. 6 id. 441; Vrooman *v.* McKaig, 4 Md. 450; Moore *v.* Beasley, 3 Ohio, 294; Schuyler *v.* Smith, 51 N. Y. 309; Bacon *v.* Brown, 9 Conn. 334; Hemphill *v.* Flynn, 2 Penn. St. 144; McGregor *v.* Rawle, 57 Penn. St. 184; Noel *v.* McCrary, 7 Coldw. 623; Ives *v.* Williams, 50 Mich. 100, 106; Tolle *v.* Orth, 75 Ind. 298.

the landlord have agreed to a new tenancy; but this agreement may be implied.[1] And the rule in England seems to be the same.[2]

§ 828. **Tenant estopped to deny Landlord's Title.** — The principle that regulates the relation of landlord and tenant, however, so far applies between them that a tenant at sufferance will not be admitted to question the title of his lessor in an action to recover possession of the land.[3]

§ 829. **Nature of the Tenancy.** — And yet a holding by sufferance is rather like a tenancy between landlord and tenant than in fact such a tenancy, for it is defective in one of the elements of such a tenancy, namely, an agreement express or implied by which it is continued. The moment the parties agree, the one to hold and the other to permit him to hold possession, it becomes a tenancy at will, or from year to year, and ceases to be one at sufferance.[4] Such would be the effect of paying and receiving rent for the time the tenant should hold over,[5] or suffering a distress,[6] and very slight circumstances will suffice to establish such an agreement.[7] There is neither privity of contract nor of estate between the owner and tenant, for the tenant is not in by contract, nor has he any estate which he can transfer or transmit, or which can be enlarged by release. He has a mere naked possession without right of notice to quit; and, owing to his anomalous position, he is not entitled to emblements.[8] But though this possession is wrongful, he is, for technical reasons, not liable in trespass by reason thereof. His holding is by the laches of the owner, who may enter at any moment and put an end to the same. But until that has been done he cannot have trespass against the tenant for such occu-

[1] Edwards *v.* Hale, 9 Allen, 462; Emmes *v.* Feely, 132 Mass. 346; Porter *v.* Hubbard, 134 Mass. 233, 238; Withers *v.* Larrabee, 48 Me. 570; Ackerman *v.* Lyman, 20 Wis. 454; Russell *v.* Fabyan, 34 N. H. 218; Condon *v.* Barr, 47 N. J. 113.

[2] Ibbs *v.* Richardson, 9 Ad. & E. 849; Levy *v.* Lewis, 9 C. B. N. S. 872.

[3] Jackson *v.* M'Leod, 12 Johns. 182.

[4] Smith, Land. & Ten. 26; Watkins, Conv. 24.

[5] Smith, Land. & Ten. 219–221; Russell *v.* Fabyan, 34 N. H. 223; Emmons *v.* Scudder, 115 Mass. 367; Morris *v.* Niles, 12 Abb. Pr. R. 103.

[6] Panton *v.* Jones, 3 Camp. 372.

[7] Griffith *v.* Knisely, 75 Ill. 411.

[8] Doe *v.* Turner, 7 M. & W. 226.

pation.[1] And where he has made such entry, he may treat the tenant as a trespasser in holding over, or any one holding under him.[2] But a tenant at sufferance cannot maintain trespass against lessor for making a peaceable entry upon the premises.[3] If, after the expiration of a tenant's term, his landlord bring a writ of entry at common law to recover possession, the judgment which he recovers embraces the mesne profits to which he will be entitled. But if he sues out the process of forcible entry and detainer, and thereby obtains possession of the premises, he may after that sue in trespass for mesne profits against the tenant.[4] Nor could he, at common law, recover rent as such for such possession, it being the owner's own laches in suffering him to retain it;[5] but he might recover in an action for use and occupation.[6] And the defect of the common law, in respect to its holding a tenant at sufferance exempt from rent, is obviated by the English statutes, 4 Geo. II. c. 28, and 11 Geo. II. c. 19, making him liable for double rent if he holds over after notice to quit.[7] Similar statutes may be found in New York[8] and many other States. In Pennsylvania a land-

[1] 2 Bl. Com. 150; Watkins, Conv. 24; Jackson *v.* Parkhurst, 5 Johns. 128; 4 Kent, Com. 117. "One tenant at sufferance cannot make another," per Lord Ellenborough, Thunder *v.* Belcher, 3 East, 451; Layman *v.* Throp, 11 Ind. 352

[2] Curl *v.* Lowell, 19 Pick. 27; Butcher *v.* Butcher, 7 B. & C. 399; Hey *v.* Moorhouse, 6 Bing. N. C. 52.

[3] Esty *v* Baker, 50 Me. 334.

[4] Sargent *v.* Smith, 12 Gray, 426; Raymond *v.* Andrews, 6 Cush. 265.

[5] 2 Bl. Com. 150, Chitty's note; Sir Moil Finch's Case, 2 Leon. 113; Tud. Cas. 9. This point is noticed but left undecided by the court in Delano *v.* Montague, 4 Cush. 42. In Flood *v.* Flood, 1 Allen, 217, though the action was for use and occupation, it was said that *rent* was not recoverable; and this is repeated in Cunningham *v.* Holton, 55 Me. 33, 38, though not in issue, as the tenant had paid.

[6] Ibbs *v.* Richardson, 9 Ad. & E. 849; Levi *v.* Lewis, 6 C. B. N. S. 766. For the landlord may waive the tort and sue in assumpsit. Ibid.; Nat. Oil Ref. Co. *v.* Bush, 88 Penn. St. 335; Stockton's App., 64 Penn. St. 63. In Bonney *v.* Foss, 62 Me. 63, a tenant holding over was held liable, presumably as a tenant at sufferance. In Hogsett *v.* Ellis, 17 Mich. 351, 367–370, the authorities are carefully examined, and the distinction between rent and use and occupation pointed out. And now by statute in Massachusetts such tenant is liable. Pub. Stat. c. 121, §§ 3, 5. Although it is still doubtful if assumpsit for use and occupation lay prior thereto Porter *v.* Hubbard, 134 Mass. 233, 238. But such action will not lie even under such a statute, where the occupant has never been in privity or his holding has been adverse. Hogsett *v.* Ellis, *supra*.

[7] Smith, Land. & Ten. 245.

[8] 2 Rev. Stat. (9th ed.) p. 1819, § 11.

lord is allowed to recover against a tenant who holds over without distinguishing whether the liability is for mesne profits or damages, or for use and occupation.[1] But generally no recovery can be had against an occupant, even under statutes giving an action against occupants, or tenants at sufferance, unless they originally held by some agreement with the plaintiff, or some other person with whom he is in privity. If the tenant denies the plaintiff's title, or that he holds under him, he must bring trespass or ejectment for mesne profits.[2] But to constitute a tenancy by sufferance, one must hold an estate less than a fee, and subordinate to a fee. If he hold by a title which does not answer these conditions, although it may have failed or come to an end, it would not render him a tenant at sufferance, or liable as such.[3]

§ 830. **Tenant's Possession not adverse.** — While the owner cannot treat the tenant at sufferance as a trespasser, until he shall have gained possession of the premises by entry thereon,[4] the tenant cannot avail himself of his possession as being adverse to the owner for the purpose of barring his claim under the statute of limitations.[5] And the landlord may have case against such tenant for injuries done to the premises while retained by him, and before entry made by the landlord.[6] It seems to be immaterial that the owner should make any formal declaration of the intent with which he enters, if he actually

[1] Stockton's Appeal, 64 Penn. St. 63.

[2] Knowles *v.* Hull, 99 Mass. 562; Merrill *v.* Bullock, 105 Mass. 491; Tinder *v.* Davis, 88 Ind. 99; Whitney *v.* Dart, 117 Mass. 513; Wills *v* Wills, 34 Ind. 106; Chamberlain *v.* Dunahue, 45 Vt. 50; Marquette R. R. *v.* Harlow, 37 Mich. 554. But merely paying rent to the mortgagor or his assignee after entry by the mortgagee does not make an adverse holding as to the latter. Sucier *v.* Marsales, 133 Mass. 454.

[3] Cook *v.* Norton, 48 Ill. 20.

[4] 2 Bl. Com. 150; Co. Lit. 57 *b*; Rising *v.* Stannard, 17 Mass. 282; Newton *v.* Harland, 1 Manu. & G. 644; Trevillian *v.* Andrew, 5 Mod. 384.

[5] Watkins, Conv. 24, Morley & Coote's ed.; Smith, Land. & Ten. 217; Doe *v.* Hull, 2 Dowl. & R. 38, per Abbott, C. J.; 2 Smith, Lead. Cas. (5th Am. ed.) 532; Tud. Cas. 8. By Stat. 3 & 4 Wm. IV. c. 27, the limitation begins to run against the landlord from the time he might have entered. But this has not been followed, as is said, in any of the United States. Smith, Land. & Ten. 218, n., Morris's ed.; Edwards *v.* Hale, 9 Allen, 464, 465; Colvin *v.* Warford, 20 Md. 396; Gwynn *v.* Jones, 2 Gill & J. 173.

[6] Russell *v.* Fabyan, 34 N. H. 218, 225.

regains his possession. He may then have trespass against the tenant for holding adversely to him.[1]

§ 831. **Tenant's Assignee's Possession adverse.** — But what has been said as to the possession of a tenant at sufferance not being adverse to that of the owner, does not apply to the case of one coming into possession as assignee or representative of such tenant. As the latter can neither assign nor transmit his tenancy at sufferance, whoever comes in under him will hold adversely to the owner, and his possession may, under the statute of limitations, in process of time, ripen into a good title, unless he shall have recognized the title of the owner, and that he held under him.[2]

§ 832. **Landlord's Right to expel Tenant.** — [In England, as well as in this country, the question has been much discussed as to the right of the owner to regain his possession by force by entering and expelling the tenant by sufferance.] The question has principally grown out of statute 5 Rich. II. c. 7, forbidding an entry to be made "with strong hand or a multitude of people, but only in a peaceable and easy manner;" and the statute of 8 Hen. VI. c. 9, by which damages and restitution were given to the freeholder disseised. Similar statutes have been passed in most or all of the States.[3] Would the owner of land or tenements, who, in recovering possession of the same from a tenant at sufferance, should use so much violence as to subject him to indictment for a breach of the peace, thereby become liable to the tenant for thus ousting him? In 1840 it was stated by Erskine, J., that the question had never before been brought directly before the court sitting in bench.[4] It might be added that it did not properly

[1] Dorrell *v.* Johnson, 17 Pick. 266; Butcher *v.* Butcher, 7 B. & C. 399; Hey *v.* Moorehouse, 6 Bing. N. C. 52; Pearce *v.* Ferris, 10 N. Y. 280. This is not intended to apply to cases where the statute requires the landlord to give formal notice, in order to avail himself of the summary process for ejecting a tenant at sufferance. Livingston *v.* Tanner, 12 Barb. 481.

[2] 2 Flint. Real Prop. 224; Smith, Land. & Ten. 217; Watkins, Conv. 25; Nepean *v.* Doe, 2 M. & W. 911; Tud. Cas. 8; Fisher *v.* Prosser, Cowp. 217; Reckhow *v.* Schanck, 43 N. Y. 448.

[3] For what entry by force into premises in the possession of another would not come within the meaning of "forcible entry," see Pike *v.* Witt, 104 Mass. 595.

[4] Newton *v.* Harland, 1 Mann. & G. 644.

arise in that case, as the entry was peaceable and the force used in expelling was not excessive. The court in deciding the case, which was trespass for assault, held that any force to the person of the occupant made the entry an illegal one, *ab initio*, by relation. The more modern doctrine of the English courts is clearly in accordance with the opinion of Baron Parke, expressed in the following terms: "I should have no difficulty in saying that where a breach of the peace is committed by a freeholder who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for forcible entry, *he is not liable to the other party.*"[1] And the law, as generally adopted in the United States, may be assumed to be substantially as laid down by Baron Parke. If the owner of land wrongfully held by another enter and expel the occupant, but makes use of no more force than is reasonably necessary to accomplish this, he will not be liable to an action of trespass *quare clausum*, nor for assault and battery, nor for injury to the occupant's goods, although, in order to effect such expulsion and removal, it becomes necessary to use so much force and violence as to subject him to indictment at common law for a breach of the peace, or under the statute for making forcible entry.[2] In accordance with the foregoing propositions, the cases cited below seem fully to

[1] Harvey *v.* Brydges, 14 M. & W. 442; Alderson and Platt, BB., concurred; see Taylor *v.* Cole, 3 T. R. 292; Taunton *v.* Costar, 7 T. R. 431; Butcher *v.* Butcher, 7 B. & C. 399; Turner *v.* Maymott, 1 Bing. 159; Kavanagh *v.* Gudge, 7 Mann. & G. 316, preceding this case; also Co. Lit. 257 *a*, Butler's note, 199; and Pollen *v.* Brewer, 7 C. B. N. S. 371; Blades *v.* Higgs, 10 C. B. N. S. 713, 721; Davison *v.* Wilson, 11 Q. B. 890; Burling *v.* Read, id. 904; Davis *v.* Burell, 10 C. B. 821; Meriton *v.* Coombes, 1 Lowndes, M. & P. 510; Lows *v.* Telford, 1 App. Ca. 414, 426, which have followed and affirmed it. "The opinion in the case of Newton *v.* Harland is alike adverse to the prior as well as the subsequent decisions of the English courts on this question." Stearns *v.* Sampson, 59 Me. 568.

[2] Hyatt *v.* Wood, 4 Johns. 150; Muldrow *v.* Jones, Rice (S. C.), 71; Ives *v.* Ives, 13 Johns. 235; Jackson *v.* Farmer, 9 Wend. 201; Jackson *v.* Morse, 16 Johns. 197; Beecher *v.* Parmele, 9 Vt. 352; Johnson *v.* Hannahan, 1 Strobh. 313; Overdeer *v.* Lewis, 1 Watts & S. 90; Sampson *v.* Henry, 13 Pick. 36; s. c. 11 Pick. 379; Meader *v.* Stone, 7 Met. 147; Miner *v.* Stevens, 1 Cush. 482; Lackey *v.* Holbrook, 11 Met. 458; Fifty Assoc. *v.* Howland, 5 Cush. 214.

sustain the doctrine, that trespass will not lie in favor of a tenant by sufferance against his landlord for entering and expelling him from the premises, assuming, of course, that he uses no unnecessary force or violence in so doing.[1]

§ 833. **A Tenant at Sufferance is not entitled to Notice to quit** before the summary process for his removal provided by statute, or an action of ejectment, is commenced, where the tenant holds over after the determination of his lease.[2] In Michigan, tenants at will and at sufferance are put on the same basis as to notice, in determining the tenancy, unless the tenancy at sufferance has become such by the determination of the tenancy by notice. But the court were divided on the point whether after a sale and foreclosure of a mortgage, the mortgagor is entitled to notice before the purchaser can commence proceedings to remove him.[3]

[1] Taunton *v.* Costar, 7 T. R. 431; Moore *v.* Mason, 1 Allen, 406; Curtis *v.* Galvin, 1 Allen, 215; Mason *v.* Holt, 1 Allen, 46. See Todd *v.* Jackson, 26 N. J. 525; Krevet *v.* Meyer, 24 Mo. 107; Fuhr *v.* Dean, 26 Mo. 116, 118. *Contra*, Dustin *v.* Cowdry, 23 Vt. 631; Whittaker *v.* Perry, 38 Vt. 107; Reeder *v.* Purdy, 41 Ill. 279; Wilder *v.* House, 48 Ill. 280. These cases are based on the overruled English cases of Hillary *v.* Gay, 6 C. & P. 284; Newton *v.* Harland, 1 Mann. & G. 644, and are not in accordance with the otherwise unbroken current of American authorities. And see Sterling *v.* Warden, 51 N. H. 239, where the text is cited with approval; Stearns *v.* Sampson, 59 Me. 568; Trible *v.* Frame, 7 J. J. Marsh. 601; Jackson *v.* Farmer, 9 Wend. 201; Low *v.* Elwell, 121 Mass. 309; Stone *v.* Lahey, 133 Mass. 426.

[2] Hollis *v.* Pool, 3 Met. 350; Mason *v.* Denison, 11 Wend. 612; Young *v.* Smith, 28 Mo. 65; Howard *v.* Carpenter, 22 Md. 25. The notice to quit referred to is the formal notice heretofore referred to in cases of tenancies at will or from year to year. They cannot, however, be treated as trespassers until they have been notified of the owner's demand for the premises. But for this purpose the briefest period is sufficient. Arnold *v.* Nash, 126 Mass. 397. In New York the statute requiring notice to terminate a tenancy "by sufferance," only applies where a tenant has held over for so long a time as to raise a presumption that he has the assent of the lessor so to do. Smith *v.* Littlefield, 51 N. Y. 543. But in Michigan it requires three months' notice to determine either estates at sufferance or will. Bennett *v.* Robinson, 27 Mich. 32.

[3] Allen *v.* Carpenter, 15 Mich. 34.

CHAPTER XXXII.

LICENSES.

§ 834. Easements and licenses related.
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§ 834. **Easements and Licenses related.** — The subjects of easements and license are so nearly related to leases and tenancies of lands, in some of their characteristics, that it seems proper to notice this relation, since it is sometimes difficult to distinguish between them.[1] An easement is always distinct from the occupation and enjoyment of the land itself, and in this respect differs altogether from the interest of a lessee. It is a liberty, privilege, or advantage in land, without profit, distinct from an ownership of the soil, and rests upon a grant by deed or writing, the existence and execution of which may be inferred by a length of enjoyment, to which is applied the term "prescription."[2] It is an incorporeal hereditament, susceptible of a permanent enjoyment by one man in another's land, such as that of way, or light, or air.[3]

[1] Dolittle *v.* Eddy, 7 Barb. 74.

[2] 3 Kent, Com. 452; Gale & Whatley, Easements, 12; Dolittle *v.* Eddy, 7 Barb. 74; Morse *v.* Copeland, 2 Gray, 302; Blaisdell *v.* Railroad, 51 N. H. 485.

[3] Termes de la Ley, "Easement."

§ 835. **Definition of License.** — A license is an authority to do a particular act or series of acts upon another's land, without possessing any estate therein.[1] A license to do a thing includes the doing whatever is necessary to accomplish it, as, for example, to remove a heavy object, the licensee may employ the necessary men and means to do it.[2] But it does not relieve the licensee from responsibility for acts done carelessly or unskilfully.[3] It may be granted upon condition precedent; and upon the licensee's failing to perform this his license will become inoperative and of no effect.[4]

§ 836. **Distinction between Easement and License.** — An easement implies an interest in the land which can only be created as above stated, by writing, or, constructively, its equivalent, — prescription. A license may be created by parol, as it passes no interest in the land, though a permission to use, occupy, or take the profits of land, is sometimes called a license, but is more in the nature of a lease.[5] It matters not whether the license be oral or in writing, in respect to its being parol, if the paper giving it have no requisites of a grant.[6] A license is often implied by the act of the owner of land: "The publican, the miller, the broker, the banker, the wharfinger, the artisan, or any professional man whatever, licenses the public to enter his place of business in order to attract custom, but when the business is discontinued, the license is at an end," per Gibson, C. J., illustrating the doctrine that when one opens a way across his land from one public thoroughfare to another, it would be

[1] Cook *v.* Stearns, 11 Mass. 533; Tayler *v.* Waters, 7 Taunt. 374; Mumford *v.* Whitney, 15 Wend. 380; Wolfe *v.* Frost, 4 Sandf. Ch. 72; Bridges *v.* Purcell, 1 Dev. & B. 496; Blaisdell *v.* Railroad, 51 N. H. 485. Hence, if the land is taken by eminent domain, the licensee has no claim for damages. Clapp *v.* Boston, 133 Mass. 367.

[2] Sterling *v.* Warden, 51 N. H. 227.

[3] Selden *v.* Del. Canal Co., 29 N. Y. 640.

[4] Mumford *v.* Whitney, 15 Wend. 380; Pratt *v.* Ogden, 34 N. Y. 22.

[5] Wood *v.* Leadbitter, 13 M. & W. 838; 3 Kent, Com. 452; Gale & Whatley, Ease. 20; King *v.* Horndon, 4 M. & S. 562; Dolittle *v.* Eddy, 7 Barb. 74; Washb. Ease. 5; *Ex parte* Coburn, 1 Cow. 568; Wallis *v.* Harrison, 4 M. & W. 543; Thomas *v.* Sorrell, Vaughan. 351; Bailey *v.* Stephens, 12 C. B. N. S. 111; Muskett *v.* Hill, 5 Bing. N. C. 694.

[6] Blaisdell *v.* Railroad, 51 N. H. 485; Dodge *v.* McClintock, 47 N. H. 383; Wiseman *v.* Lucksinger, 84 N. Y. 31.

regarded as a license to pass over it.[1] So a familiar intercourse between families may be evidence of a general license to pass over the land of each other for the purpose of visiting.[2] And one has a license to enter a post-office at proper hours to inquire for and receive mail-matter.[3]

§ 837. **Licenses are of two kinds,** one called executory, where the act licensed to be done is yet to be performed, the other executed, where it has been done. The distinction is an important one, as bearing upon the right of the licenser to revoke the license.

§ 838. **Executory Licenses.** — So long as it is executory, it may be revoked at the pleasure of the licenser, for, from its very nature, it is essentially different from a grant in respect to carrying with it the means of being enforced by legal or equitable process.[4] Where A and B mutually gave each other a license to do acts upon the other's land, it was deemed to be an executory one, even though one may have expended money upon the other's land, relying upon such license. And A may revoke the license on his part, even if B do not on his.[5] And where no time is fixed within which the license is to exercised, it must be within a reasonable time.[6]

§ 839. **Executed Licenses.** — If it has been executed, it has the effect to relieve or excuse him who may have done the act from liability on account of the same, as well as from the consequences thereof, which may arise prior to a revocation of the license.[7] Thus, if one by license of another tears down an ex-

[1] Gowen *v.* Phila. Exch. Co., 5 W. & S. 141, 143; Kay *v.* Penn. R. R., 65 Penn. St. 273; Root *v.* Commonwealth, 98 Penn. St. 170.

[2] Martin *v.* Houghton, 45 Barb. 258; Adams *v.* Freeman, 12 Johns. 408.

[3] Sterling *v.* Warden, 51 N. H. 231.

[4] Cook *v.* Stearns, 11 Mass. 533; Mumford *v.* Whitney, 15 Wend. 380; Miller *v.* Aub. & S. R. R., 6 Hill, 61; Sterling *v.* Warden, 51 N. H. 227; Veghte *v.* Raritan Co., 19 N. J. Eq. 142, 154.

[5] Dodge *v.* McClintock, 47 N. H. 383; Houston *v.* Laffee, 46 N. H. 505.

[6] Hill *v.* Hill, 113 Mass. 103.

[7] Cook *v.* Stearns, 11 Mass. 533; Sampson *v.* Burnside, 13 N. H. 264; Hewlins *v.* Shippam, 5 B. & C. 221; Stevens *v.* Stevens, 11 Met. 251; Foot *v.* N. Haven & North. Co., 23 Conn. 214; Wood *v.* Leadbitter, 13 M. & W. 838; Syron *v.* Blakeman, 22 Barb. 336; Selden *v.* Del. Canal Co., 29 N. Y. 639. See Web *v.* Paternoster, Palmer, 71, a case of a license not revocable; Barnes *v.* Barnes, 6 Vt. 388; Snowden *v.* Wilas, 19 Ind. 13; Pratt *v.* Ogden, 34 N. Y. 20.

isting mill-dam, or digs and lays an aqueduct in the other's land, or cuts a tunnel in his land, by which the water of a stream is diverted, or cuts down a tree in the other's land, and the like, no action will lie in favor of such landowner, however much he may be injured by such act.[1] Nor does it make any difference that the license in such case is given by parol, since the statute of frauds does not apply to executed licenses like these.[2]

§ 840. **Revocation of Licenses.** — Questions of the most difficulty in respect to licenses arise, where the one who grants, seeks to revoke the license, after the party to whom it was given has enjoyed or exercised it, and especially where he has incurred expense thereby, as in erecting costly structures upon the land of the licenser, or upon his own land, affecting the land of the licenser. Many dicta and decisions upon this class of cases are to be found in the books. Thus, it is said, "A license under seal, provided it be a mere license, is as revocable as a license by parol," and "a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol."[3] But even if the license be so granted as to be effectual, it will be strictly construed, and a license to build a dam upon the licenser's land does not carry a license to rebuild, if it is destroyed.[4]

§ 841. **When Licenser may always revoke.** — If the parties, in case a license were revoked, would be left in the same condition as before it was given, the proposition seems to be a general one, that the licenser may revoke it at his pleasure. Such would be the case in respect to a license to fish in another's

[1] Prince *v.* Case, 10 Conn. 378; Fentiman *v.* Smith, 4 East, 107; Sampson *v.* Burnside, 13 N. H. 264; Kent *v.* Kent, 18 Pick. 569; Bridges *v.* Purcell, 1 Dev. & B. 496; Pratt *v.* Ogden, *supra*.

[2] Tayler *v.* Waters, 7 Taunt. 374; Woodbury *v.* Parshley, 7 N. H. 237; Walter *v.* Post, 6 Duer, 363. See *post*, § 844.

[3] Wood *v.* Leadbitter, 13 M. & W. 845, per Alderson, B. See also Jackson *v.* Babcock, 4 Johns. 418; Wood *v.* Manley, 11 Ad. & E. 34; Wallis *v.* Harrison, 4 M. & W. 538; Williamston, etc. R. R. *v.* Battle, 66 N. C. 545.

[4] Cowles *v.* Kidder, 24 N. H. 364; Carleton *v.* Redington, 21 N. H. 293; Wingard *v.* Tift, 24 Ga. 179. There is an able discussion of the subject of this section, especially so much of it as relates to flowing lands, by Judge Cooley of Michigan, in 2 Bench & Bar, N. S. 97–106.

water, or to hunt in his park, or to use a carriage-way, and the like.[1]

§ 842. **Facts which terminate a License.** — A license is generally so much a matter of personal trust and confidence that it does not extend to any one but the licensee. The death of either party will, of itself, revoke it. So would a transfer or alienation of the interest of the licenser or licensee in the subject-matter of the license.[2] The same would be true if a licensee put the premises to a use inconsistent with the license.[3]

§ 843. **Instances of Revocable Licenses.** — Another class of cases where the license may be revoked is where the act licensed to be done is to be done upon the land of the licenser, and if granted by deed would amount to an easement therein. If such license be by parol, it may be revoked as to any act thereafter to be done, even though in order to enjoy it the licensee may have incurred expenses upon the premises of the licenser. Thus where A, by B's license, laid an aqueduct across B's land, who then revoked it, and cut off the pipe that conducted the water, the court, as a court of equity, refused to interfere, because B had a right to revoke the license at his pleasure.[4]

§ 844. **Revocability of Executed Licenses.** — [In so far as a license has been executed it is irrevocable, that is, the license cannot be revoked so as to render the licensee a wrongdoer as

[1] Sampson *v.* Burnside, 13 N. H. 264 ; Liggins *v.* Inge, 7 Bing. 682 ; Wood *v.* Leadbitter, 13 M. & W. 838.

[2] Ruggles *v.* Lesure, 24 Pick. 187 ; Prince *v.* Case, 10 Conn. 375 ; Jackson *v.* Babcock, 4 Johns. 418 ; Emerson *v.* Fisk, 6 Me. 200 ; Cowles *v.* Kidder, 24 N. H. 364 ; Coleman *v.* Foster, 1 Hurlst. & N. 37 ; Wolfe *v.* Frost, 4 Sandf. Ch. 93 ; Wickham *v.* Hawker, 7 M. & W. 77 ; Duchess of Norfolk *v.* Wiseman, cited 7 M. & W. 77 ; Wallis *v.* Harrison, 4 M. & W. 538 ; Harris *v.* Gillingham, 6 N. H. 9 ; Carleton *v.* Redington, 21 N. H. 293 ; Snowden *v.* Wilas, 19 Ind. 13 ; Blaisdell *v.* Railroad, 51 N. H. 485 ; Howe *v.* Batchelder, 49 N. H. 204 ; Johnson *v.* Skillman, 29 Minn. 95 ; Bates *v.* Duncan, 64 Ark. 339 ; s. c. 42 S. W. Rep. 410 ; s. c. 62 Am. St. Rep. 190. Parol sale of standing trees carries a license to enter and cut which is revoked by seller's death. Spacy *v.* Evans, 152 Ind. 431 ; s. c. 52 N. E. Rep. 605.

[3] Mayor of Chauncey *v.* Brown, 99 Ga. 766 ; s. c. 26 S. E. Rep. 763.

[4] Owen *v.* Field, 12 Allen, 457 ; Selden *v.* Del. Canal Co., 29 N. Y. 639 ; Wiseman *v.* Lucksinger, 84 N. Y. 31 ; Eggleston *v.* N. Y., etc. R. R., 35 Barb. 162 ; Houston *v.* Laffee, 46 N. H. 507 ; Marston *v.* Gale, 24 N. H. 176 ; Hetfield *v.* Cent. R. R., 29 N. J. 571.

to what he has done under the license. But, according to the generally accepted doctrine, a license, although executed, may be revoked as to any subsequent privilege thereunder, notwithstanding that the licensee may have incurred expense for which he can claim no remuneration. Thus, a license to cut a drain through the licenser's land,[1] or to construct a culvert,[2] or to build a dam,[3] or to flow the licenser's land,[4] or to erect and maintain a house on the licenser's land,[5] or to lay water mains through the licenser's land,[6] or to build a causeway,[7] or to cut trees on the licenser's land, although in writing,[8] may all be revoked so as to cause all continuing right under the license to cease, although the licensee may have gone to great expense in acting under the license and the revocation works great loss to him. He is without remedy at law. Nevertheless, equity will generally interfere by injunction *nisi*.[9] But the licensee may remove his improvements.[10]]

§ 845. **Revocability, continued.** — And it is justly remarked in a case in New York,[11] that if the doctrine of the irrevocability

[1] Cocker *v.* Cowper, 1 Cr. M. & R. 418; Hewlins *v.* Shippam, 5 B. & C. 221; Sampson *v.* Burnside, 13 N. H. 264; Fentiman *v.* Smith, 4 East, 107; Pifer *v.* Brown, 43 W. Va. 412; s. c. 27 S. E. Rep. 399.

[2] Foot *v.* N. Haven & North. Co., 23 Conn. 223. See Mason *v.* Hill, 5 B. & Ad. 1.

[3] Mumford *v.* Whitney, 15 Wend. 380; Cook *v.* Stearns, 11 Mass. 533; Smith *v.* Goulding, 6 Cush. 155; Addison *v.* Hack, 2 Gill, 221; Cowles *v.* Kidder, 24 N. H. 364; Stevens *v.* Stevens, 11 Met. 251; Trammell *v.* Trammell, 11 Rich. 474.

[4] Hazleton *v.* Putnam, 3 Chand. (Wis.) 117; Bridges *v.* Purcell, 1 Dev. & B. 492; Thompson *v.* Gregory, 4 Johns. 81; Carleton *v.* Redington, 21 N. H. 293; Hall *v.* Chaffee, 13 Vt. 150, 157; Woodward *v.* Seeley, 11 Ill. 157, 165; Clute *v.* Carr, 20 Wis. 533.

[5] Jamieson *v.* Millemann, 3 Duer, 255; Prince *v.* Case, 10 Conn. 378; Jackson *v.* Babcock, 4 Johns. 418; Bachelder *v.* Wakefield, 8 Cush. 252; Harris *v.* Gillingham, 6 N. H. 9; Benedict *v.* Benedict, 5 Day, 464.

[6] Great Falls Waterworks Co. *v.* G. N. R'y Co., 21 Mont. 487; s. c. 54 Pac. Rep. 963.

[7] *Ex parte* Coburn, 1 Cow. 568; Foster *v.* Browning, 4 R. I. 47; Dexter *v.* Hazen, 10 Johns. 246; Wallis *v.* Harrison, 4 M. & W. 538.

[8] Tillotson *v.* Preston, 7 Johns. 285; Giles *v.* Simonds, 15 Gray, 441. But if coupled with a sale, *aliter* if executed, and query if executory also. *Post*, § 847.

[9] See *post*, § 849.

[10] See *post*, § 850.

[11] Wolfe *v.* Frost, 4 Sandf. Ch. 90.

of an executed license maintained in some jurisdictions[1] is law a parol license executed or acted upon is sufficient to pass an incorporeal hereditament, thus not merely repealing the statute of frauds, but abolishing the rules of the common law that such an estate can only be conveyed by a deed. The case of Wood *v.* Leadbitter was this: The owner of land, on which was a stand for the spectators at a horse-race, sold a ticket to the plaintiff to enter and witness the race. Before the race was over, without any misconduct on the part of the plaintiff, or tendering him back the admission fee, the owner ordered him to leave the premises, and afterwards removed him; and it was held that his ticket was a mere license which was revocable.[2] And the same doctrine of a right in the vendor of a ticket, to revoke the license it gives to witness an exhibition, was applied in case of a play at the theatre and at a concert. But in such a case, the purchaser would be entitled to damages in an action of assumpsit for a breach of contract. So where, by a parol license, one had gone on and excavated another's land for minerals, at great expense, and, while pursuing the business of mining, was forbidden by the owner, it was held that the latter might revoke the license, and the licensee would be without remedy.[3]

§ 846. **A Contrary Doctrine in some States.** — In the case of Foster *v.* Browning,[4] Ames, C. J., remarks, that "in Maine,[5] New Hampshire, Pennsylvania, and Ohio, and perhaps in some other States, the exploded doctrine of some of the earlier English cases is still maintained at law, upon the equitable grounds of estoppel and part performance of a parol contract," and intimates that a court with full equity powers might, in some of

[1] See *post*, § 846.

[2] Wood *v.* Leadbitter, 13 M. & W. 838; Coleman *v.* Foster, 1 Hurlst. & N. 37. To the above cases may be added, upon the general subject of revoking licenses, Fuhr *v.* Dean, 26 Mo. 119; Ford *v.* Whitlock, 27 Vt. 268; Hays *v.* Richardson, 1 Gill & J. 383; Morse *v.* Copeland, 2 Gray, 302; Williams *v.* Morris, 8 M. & W. 488.

[3] Desloge *v.* Pearce, 38 Mo. 599; McCrea *v.* Marsh, 12 Gray, 213; Burton *v.* Scherpf, 1 Allen, 134. See Adams *v.* Andrews, 15 Q. B. 296; Hatheway *v.* Yakima Water L. & P. Co., 14 Wash. St. 469; s. c. 44 Pac. Rep. 896; s. c. 53 Am. St. Rep. 874.

[4] 4 R. I. 52, 53.

[5] But see Pitman *v.* Poor, 38 Me. 237, *contra*.

those cases, give relief, where the same could not be had at common law. It will be accordingly found in a great number of cases, that in Pennsylvania the courts hold that an executed license, where the licensee has incurred expense, as in erecting a dam upon the licenser's land to operate a mill erected on his own, and the like is not revocable.[1] The Pennsylvania doctrine rests upon the idea of estoppel, whereby equity treats an executed license as giving an absolute right, because the parties cannot be restored *in statu quo* if it is revoked. But it is limited to cases where something has been done under the license, and it is impossible to restore the licensee *in statu quo*. It would not be so if the licensee had simply paid a consideration for the license.[2] [The Pennsylvania doctrine is substantially adopted in Iowa,[3] Indiana,[4] Nevada,[5] Georgia,[6] New Hampshire,[7] Ohio,[8] Texas,[9] Alabama,[10] Delaware,[11] and Oregon.[12] Some of these cases will be found to proceed upon the theory of estoppel *in pais*, the others on the theory of the specific enforcement of a parol contract for an easement, which has been taken out of the operation of the statute of frauds by part performance.]

§ 847. **License coupled with an Interest.** — There are licenses which are irrevocable until a reasonable time has elapsed for the licensee to execute them; as where, for instance, the license is directly connected with the title to personal property which the licensee acquires from the licenser at the time the license is given, whereby the license is coupled with an interest. Thus, where one sells personal chattels on his own land, and

[1] Rerick *v.* Kern, 14 S. & R. 267; Wheatley *v.* Chrisman, 24 Penn. St. 298; Strickler *v.* Todd, 10 S. & R. 74; Lacey *v.* Arnett, 33 Penn. St. 169; Campbell *v.* McCoy, 31 Penn. St. 263; Swartz *v.* Swartz, 4 Penn. St. 358.

[2] Huff *v.* McCauley, 53 Penn. St. 209; Wiseman *v.* Lucksinger, 84 N. Y. 31.

[3] Wickersham *v.* Orr, 9 Iowa, 253; Beatty *v.* Gregory, 17 Iowa, 109.

[4] Joseph *v.* Wild, 146 Ind. 249; s. c. 45 N. E. Rep. 467.

[5] Lee *v.* McLeod, 12 Nev. 280.

[6] Cook *v.* Pridgen, 45 Ga. 331.

[7] Woodbury *v.* Parshley, 7 N. H. 237.

[8] Meek *v.* Breckenridge, 29 Ohio St. 642.

[9] Harrison *v.* Boring, 44 Tex. 255.

[10] Rhodes *v.* Otis, 33 Ala. 578.

[11] Jackson Co. *v.* P. W. & B. R. R., 4 Del. Ch. 180.

[12] Garrett *v.* Bishop, 27 Ore. 349; s. c. 41 Pac. Rep. 10; Bowman *v.* Bowman, 35 Ore. 279; s. c. 57 Pac. Rep. 546.

before a reasonable time to remove them, forbids the purchaser to enter and take them, it was held to be a license which he could not revoke within such reasonable time.[1] So, where A cut hay upon B's land upon shares, and stored it in B's barn upon the premises, by his permission, B could not revoke his license to A to come and divide it and carry off his share.[2] And where one gave another license to cut trees on his land, at an agreed price, to be carried away, the vendor could not revoke the license to remove such of them as had been cut under it. But until cut the owner may revoke the license, and a conveyance of the land to a third party by deed would operate as such a revocation, as soon as known to the licensee, who would thereupon become a trespasser by afterwards cutting the trees.[3] So where the owner of land sold it, reserving the trees standing and down upon it, with a right, for three years, to cut and carry them away. It was held that all that he cuts in that time are personal property, and he may carry them away afterwards, but would thereby be liable in trespass *quare clausum* for going upon the land. And the same principle applies if one man's cattle are on another man's land without his permission.[4]

§ 848. **License to destroy an Easement.** — [If the owner of an easement license the owner of the land upon which the easement is a burden to impair or destroy the easement, this license, if executed, is irrevocable, because it works an abandonment of the easement.[5] The effect of such license will be further considered hereafter in treating of easements.]

* Note. — The subject of licenses is further treated of in Angell on Watercourses, c. 8, and 2 Am. Lead. Cas. 514–538, 1st ed.

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[1] Whitmarsh *v.* Walker, 1 Met. 316; Nettleton *v.* Sikes, 8 Met. 34; Wood *v.* Manley, 11 Ad. & E. 34; Wood *v.* Leadbitter, 13 M. & W. 856 n.; Am. ed.; Marshall *v.* Green, 1 C. P. Div. 35; Parsons *v.* Camp, 11 Conn. 525; Claflin *v.* Carpenter, 4 Met. 580, 583. But see Williams *v.* Morris, 8 M. & W. 488; Giles *v.* Simonds, 15 Gray, 442; Sterling *v.* Warden, 51 N. H. 227.

[2] White *v.* Elwell, 48 Me. 360.

[3] Drake *v.* Wells, 11 Allen, 143, 144; Giles *v.* Simonds, 15 Gray, 441; Coleman *v.* Foster, 1 Hurlst. & N. 37 and notes; Roffey *v.* Henderson, 17 Q. B. 586; Wescott *v.* Delano, 20 Wis. 516, 517; but see Marshall *v.* Green, *supra;* also *ante*, § 18.

[4] Town *v.* Hazen, 51 N. H. 596.

[5] Morse *v.* Copeland, 2 Gray, 302; Addison *v.* Hack, 2 Gill, 221; Dyer

§ 849. **When Equity decrees Compensation.** — Where, under a license which has been revoked, the licensee before such revocation has made improvements upon the licensor's land by labor or money expended thereon, equity will not allow the licensor to avail himself of these, without restoring the licensee to as good a situation as he stood in before he entered upon the execution of the license.[1]

§ 850. **Removal of Personal Property.** — And where, by such revocation, the structure erected by the licensee on the licensor's land acquires the character of personal property, as in case of a house erected under the license, the licensee has an interest in the same, and may remove the structure within a reasonable time. And to that extent the license would be irrevocable.[2] But whether the licensor, upon revoking the license, can compel the licensee to restore the premises to their original condition at his expense or not, depends upon the circumstances of the case.[3]

v. Sandford, 9 Met. 395; Liggins *v.* Inge, 7 Bing. 682; Hazleton *v.* Putnam, 3 Chand. (Wis.) 124; Winter *v.* Brockwell, 8 East, 308; Hewlins *v.* Shippam, 5 B. & C. 221; Jamieson *v.* Millemann, 3 Duer, 255; Moore *v.* Rawson, 3 B. & C. 332; Foot *v.* N. Haven & North. Co., 23 Conn. 223; Gale & Whatley, Easem. 29; Cocker *v.* Cowper, per Parke, B., 1 Cr. M. & R. 420; Veghte *v.* Raritan Co., 19 N. J. Eq. 153.

[1] Hazleton *v.* Putnam, 3 Chand. (Wis.) 117; Story, Eq. Jur. § 1237; Angell, Watercourses, § 318; Short *v.* Taylor, cited 2 Eq. Cas. Abr. 522; Flack *v.* Bell, (Cal.) 42 Pac. Rep. 813; Western Union Tel. Co. *v.* Bullard, 67 Vt. 272; s. c. 31 Atl. Rep. 286.

[2] Barnes *v.* Barnes, 6 Vt. 388; Wood *v.* Leadbitter, 13 M. & W. 850, n. Am. ed.; Ashmun *v.* Williams, 8 Pick. 402; Great Falls Waterworks Co. *v.* G. N. R'y Co., 21 Mont. 487; s. c. 54 Pac. Rep. 963.

[3] Prince *v.* Case, 10 Conn. 375; Stevens *v.* Stevens, 11 Met. 251.

CHAPTER XXXIII.

ESTATES IN JOINT-TENANCY.

§ 851. Joint-tenancy defined.
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§ 851. **A Joint-tenancy is defined** to be "when several persons have any subject of property jointly between them in equal shares by purchase." "Each has the whole and every part with the benefit of survivorship, unless the tenancy be severed."[1] In the quaint language of the law they hold, each *per my et per tout*, the effect of which, technically considered, is, that for purposes of tenure and survivorship, each is the holder of the whole. But for purposes of alienation, each has only his own share.[2] And the shares of several joint-tenants, as well as of tenants in common, are always presumed to be equal.[3] If the grant of one parcel of land to two persons defines the share and interest which each is to take, it creates an estate in common, and not a joint-tenancy.[4]

[1] 1 Prest. Est. 136; Co. Lit. 180 *b*.
[2] 1 Prest. Est. 136; Wms. Real Prop. 112; Co. Lit. 186 *a*.
[3] Shiels *v*. Stark, 14 Ga. 429.
[4] Craig *v*. Taylor, 6 B. Mon. 457 Fenton *v*. Lord, 128 Mass. 466.

§ 852. **Relation of Joint-tenants to each other** — While, moreover, joint-tenants constitute but one person in respect to the estate, as to the rest of the world, between themselves each is entitled to his share of the rents and profits so long as he lives, but subject to the right of the survivor or survivors to take the entire estate upon his death, to the exclusion of his heirs or personal representatives.[1]

§ 853. **Of what Estates Joint-tenancy may be.** — There may be a joint-tenancy whether the estate be in fee, for life, for years, or at will,[2] and also of estates in remainder.[3] So there may be a joint-tenancy in an estate for life, though the reversion or remainder be in only one of the tenants; and if he who has the reversion in fee die first, his heir will be postponed as to his enjoyment of the estate until after the decease of the other joint-tenant.[4]

§ 854. **How created.** —But a joint-tenancy can only be created by purchase or act of the parties, and not by descent or act of the law. It must, moreover, be created by one and the same act, deed, or devise, and joint disseisors may be joint-tenants.[5]

§ 855. **The Four Unities.** — A joint-tenancy at common law must have a fourfold unity, as it is called, namely, of interest, of title, of time, and of possession, — the interest being acquired by all, and by the same act or conveyance, commencing at the same time, and held by the same undivided possession.[6] But under the law of uses, as well as by will, the unity of time may be so far dispensed with as to allow two or more joint-tenants to take their shares at different times.[7]

§ 856. **Of Survivorship.** — The great distinctive characteristic of joint-tenancies among estates of which there is a joint-ownership is the right of survivorship, by which, though the estate is limited to them and their heirs, the survivor or sur-

[1] Wms. Real Prop. 109; Lit. § 281; Thornburg *v.* Wiggins, 135 Ind. 178; s. c. 34 N. E. Rep. 999; s. c. 22 L. R. A. 42.

[2] 2 Bl. Com. 179; 2 Flint. Real Prop. 322.

[3] Co. Lit. 183 *b*.

[4] Lit. § 285.

[5] 2 Bl. Com. 180; Lit. §§ 277, 278; Putney *v.* Dresser, 2 Met. 583.

[6] 2 Bl. Com. 180.

[7] Wms. Real Prop. 112; 2 Prest. Abst. 67.

vivors take the entire estate, to the exclusion of the heirs or representatives of the deceased co-tenant.[1] Two corporations, therefore, cannot be joint-tenants. If they jointly own land, they are tenants in common of the same.[2]

§ 857. **Joint-tenancies in England and in the United States.** — By the common law, in England, if an estate is conveyed to two or more persons without indicating how the same is to be held, it will be understood to be in joint-tenancy.[3] Contrary to the English rule, the policy of the American law is opposed to the notion of survivorship, and if an estate is conveyed to two or more persons without indicating how it is to be held, it will be presumed to be a tenancy in common. In many of the States the rule of survivorship is abolished by statute, except in the case of joint trustees or mortgagees, while in others all estates to two or more persons are taken to be tenancies in common, unless expressly declared to be joint-tenancies by the deed or instrument creating them, with a similar exception of estates to joint trustees or mortgagees.[4] And the court of Massachusetts waived the question whether joint disseisors are tenants in common,[5] though they had previously treated them as joint-tenants, and held that, if either abandons, the other should have the entire estate.[6] But where the devise was to children, and the survivor or survivors of them, it was held to be an estate in joint-tenancy.[7] In Maryland a similar rule prevails as in Massachusetts, while in Ohio and Connecticut the estate of joint-tenancy does not exist.[8] *

* Note. — In the following States every estate granted or devised to two or more persons in their own right is construed to be a tenancy in common ; or

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[1] Lit. § 280 ; 2 Bl. Com. 183.

[2] Dewitt *v.* San Francisco, 2 Cal. 289.

[3] Wms. Real Prop. 109, Rawle's note.

[4] Mass. Pub. Stat. c. 126, § 5 ; Webster *v.* Vandeventer, 6 Gray, 428 ; Appleton *v.* Boyd, 7 Mass. 131 ; Jones *v.* Crane, 16 Gray, 308. A conveyance to husband and wife does not create a joint-tenancy, in Massachusetts, unless it is expressed to be to the grantees or devisees jointly, or as joint-tenants, or in joint-tenancy, or to them and the survivor of them. Stat. 1885, c. 237.

[5] Fowler *v.* Thayer, 4 Cush. 111.

[6] Putney *v.* Dresser, 2 Met. 583 ; Allen *v.* Holton, 20 Pick. 458.

[7] Stimpson *v.* Batterman, 5 Cush. 153.

[8] Purdy *v.* Purdy, 3 Md. Ch. Dec. 547 ; Miles *v.* Fisher, 10 Ohio, 1 ; Walker, Am. Law, 292 ; Phelps *v.* Jepson, 1 Root, 48. For the statute laws of the several States on this subject, the reader is referred to the accompanying note.

§ 858. **Incidents of Joint-tenancy.** — Among the incidents of a joint-tenancy growing out of the identity of interest and title

survivorship is abolished; or each joint-tenant's share descends, and is chargeable with his debts: namely, Massachusetts, Pub. Stat. c. 126, § 5; Maine, Rev. Stat. 1884, c. 73, § 7; New Hampshire, Pub. Stat. 1901, c. 137, § 15; Vermont, Stat. 1894, § 2202; Rhode Island, Gen. Laws 1896, c. 201, § 1; New Jersey, 1 Gen. Stat. 1895, p. 880, § 134; New York, 2 Rev. Stat. 9th ed. p. 1734, § 14; Michigan, Gen. Stat. 1882, §§ 5560, 5561; Minnesota, Stat. 1894, § 3958; Wisconsin, Annot. Stat. 1889, § 2068; Kentucky, Stat. 1894, §§ 2348, 2349; Tennessee, Code 1896, § 3677; Illinois, Rev. Stat. 1899, c. 76, § 1; Delaware, Rev. Code 1893, c. 86, § 1; Arkansas, Dig. of Stat. 1894, § 4189; Mississippi, Annot. Code 1892, § 2441; Missouri, Rev. Stat. 1899, § 4600; Colorado, Annot. Stat. 1891, c. 29, § 429; California, Civ. Code 1899, § 683; Dewey *v.* Lambier, 7 Cal. 317; Indiana, Rev. Stat. 1894, § 3341; Iowa, Annot. Code 1897, § 2923 (husband and wife take as tenants in common, Hoffman *v.* Stigers, 28 Iowa, 302); Maryland, Pub. Gen. Laws 1888, art. 50, § 13; Oregon, Annot. Laws 1887, § 2491; West Virginia, Code 1899, c. 71, §§ 18, 19; Virginia, Code 1887, § 2430; Pennsylvania, Pepper & Lewis' Dig. col. 2449, § 1; Kennedy's Appeal, 60 Penn. St. 511; North Carolina, Code 1883, §§ 1326, 1502; Georgia, Code 1895, § 3142; Florida, Rev. Stat. 1892, § 1819; Alabama, Civ. Code 1896, § 1033; Texas, Batts' Annot. Stat. 1895, § 1698.

In Massachusetts, Michigan, Wisconsin, Indiana, Mississippi, and Minnesota, joint-tenancies may exist as to mortgages, in case of devises or conveyances in trust, and where, from the tenor of the instrument creating the estate, it is manifestly intended to create an estate in joint-tenancy. See the statutes above cited; also Nichols *v.* Denny, 37 Miss. 59. The same provisions exist in Vermont and West Virginia, except as to mortgages; while in New Hampshire, New Jersey, Maryland, and Iowa, the only exception by statute is where the intent to create a joint-tenancy is express on the face of the conveyance. In Maine, when the conveyance is by mortgage, or in trust, to two or more persons, with power to appoint a successor in case one dies, it is construed a joint-tenancy, unless the contrary is expressed, but otherwise is a tenancy in common. The only exceptions in New York, Illinois, Delaware, Missouri, Arkansas, Colorado, and California, to the general rule above stated, where the joint-tenancy is not expressly declared, arise in cases where estates are vested in executors or trustees. These are held in joint-tenancy. In Virginia and Kentucky, the doctrine of survivorship is virtually abolished, as the share of each co-tenant, at his death, descends to his heirs, or may be devised. Estates held by two or more as executors or trustees, and estates where the conveyance expresses the intention that the part of the one dying shall go to the survivor, are excepted. The right of survivorship is abolished in Tennessee, Georgia, Texas, Florida, North Carolina, Alabama, and Pennsylvania. But, in Pennsylvania, there is an exception in case of estates in trustees; in North Carolina, of estates in executors; and the courts of Alabama hold that the statute does not apply to trusts and estates held in *autre droit*. Parsons *v.* Boyd, 20 Ala. 112. In South Carolina, the right of survivorship is not recognized. 1 Brev. Dig. 435; but see Ball *v.* Deas, 2 Strobh. Eq. 24. In Rhode Island the exception to the statute abolishing survivorship does not extend to devises or conveyances to husband and wife, and only applies to devises or conveyances where the instrument manifestly indicates an intention on the part of the devisor or grantor to create an

of the several tenants are these: that an entry or re-entry made by one is deemed to be the entry of all, unless clearly shown to be adverse towards his co-tenants; so livery of seisin made to one is made to all;[1] and the occupation by one co-tenant is *prima facie* an occupation by all.[2] But, inasmuch as it is competent for them to sever their interests, each, should he hold a separate and distinct portion of their common estate for the term of twenty years, would thereby acquire an estate in severalty, unless such holding was by mutual agreement.[3]

§ 859. **One Joint-tenant cannot set up Adverse Title.** — Upon the same principle of identity of interest, if one joint-tenant purchases in an adverse title to the joint estate, or acquires an older legal title, it will enure to the benefit of his co-tenants, if they will contribute *pro rata* towards defraying the expenses thereof.[4] And where a member of an existing company purchases for the uses of the company, he cannot sell it to the company at an enhanced price without disclosing the facts; the profits made belong to the company.[5] But one co-tenant may purchase and become assignee of a mortgage upon the common property, and hold as mortgagee against his co-tenant.[6]

§ 860. **Joinder as Plaintiffs and Defendants.** — Another consequence is that a joint-tenant can neither sue nor be sued alone in respect to their joint estate, if advantage of the omission to join his co-tenants be properly taken.[7]

estate in joint-tenancy. So in Kentucky, Mississippi, and West Virginia, survivorship in conveyances to husband and wife is abolished; while in Indiana and Wisconsin the joint character of such conveyances is expressly saved. And in Ohio, joint-tenancy, with a right of survivorship, never existed. Sergeant *v.* Steinberger, 2 Ohio, 305 (1 Ohio, 423).

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[1] Co. Lit. 49 *b*; 2 Cruise, Dig. 377.

[2] Wiswall *v.* Wilkins, 5 Vt. 87; Small *v.* Clifford, 38 Me. 213.

[3] Taylor *v.* Cox, 2 B. Mon. 429; Drane *v.* Gregory, 3 B. Mon. 619.

[4] Picot *v.* Page, 26 Mo. 398; Gossam *v.* Donaldson, 18 B. Mon. 230; Brittin *v.* Handy, 20 Ark. 381; Brown *v.* Hogle, 30 Ill. 119; Jones *v.* Stanton, 11 Mo. 433; Flagg *v.* Mann, 2 Sumn. 486; Weaver *v.* Wible, 25 Penn. St. 270; Tisdale *v.* Tisdale, 2 Sneed, 596; Lloyd *v.* Lynch, 28 Penn. St. 419; Gosson *v.* Donaldson, 18 B. Mon. 230; Sullivan *v.* McLenans, 2 Iowa, 437; Rothwell *v.* Dewees, 2 Black, 613. But see Wells *v.* Chapman, 4 Sandf. Ch. 312.

[5] Densmore Co. *v.* Densmore, 64 Penn. St. 43.

[6] Blodgett *v.* Hildreth, 8 Allen, 188.

[7] Lit. § 311; Webster *v.* Vandeventer, 6 Gray, 428.

§ 861. **Effect of Tenant's Death.** — The interest which a joint-tenant has as survivor is not a new one acquired by him from his co-tenant, upon the latter's death; for his own interest is not changed in amount, but only his co-tenant's is extinguished.[1]

§ 862. **One cannot charge the Estate as to the other.** — No charge, therefore, like a rent, or a right of way, or a judgment, created by one co-tenant, can bind the estate in the hands of the survivor, unless the charge be created by the one who becomes such survivor, or the creator of the charge releases his estate to a co-tenant, who, as releasee, accepts, with that part of the estate, the charge inhering therein by his own act.[2]

§ 863. **Of Waste by Joint-tenant.** — The relation, however, between joint-tenants is such, that, if either wastes the joint estate, the other may have an action of waste against him, by the statute of Westminster II. c. 22.[3] And in several of the States there are statutes giving joint-tenants actions of waste in similar cases. If one of two joint-tenants flow the joint land, so as to appropriate it to himself, the other may have an action against him as for an ouster.[4]

§ 864. **Conveyance by Joint-tenant.** — Though thus united in their ownership, either tenant may convey his share to a co-tenant, or even to a stranger, who thereby becomes tenant in common with the other co-tenant. If the conveyance be by one of two joint-tenants to the other, the estate is turned into one in severalty. But if there be more than two, the purchaser remains joint-tenant with the others, as to their original shares, and tenant in common as to the share acquired by purchase.[5] In conveying his interest to a stranger, a joint-tenant, like a tenant in common, must do so by deed of grant with words of inheritance, if it is intended to pass an estate in fee. Whereas, in conveying to his co-tenant, a release is not only sufficient, but is the proper form of making such conveyance; nor need there be any words of inheritance in the same, since the one to whom the conveyance is made is already seised of

[1] 2 Flint. Real Prop. 330.

[2] Lit. § 286; Co. Lit. 185 *b*; 2 Prest. Abst. 58, 65, 66; Tud. Cas. 724; Lord Abergaveny's Case, 6 Rep. 78.

[3] 2d Inst. 403; Shiels *v.* Stark, 14 Ga. 429.

[4] Jones *v.* Weathersbee, 4 Strobh. 50.

[5] Lit. §§ 292, 294, 304; 2 Prest. Abst. 61; Co. Lit. 273 *b*; Tud. Cas. 724.

the estate as a whole, and it is only necessary to extinguish the right of his co-tenant in order to invest him with the exclusive ownership of the entire estate.[1] But a deed of grant from one joint-tenant to another would be effectual as a release in vesting the entire ownership in the grantee.[2] So, a mortgage by a joint-tenant of his share to a stranger would be effectual against survivorship, and may amount to a severance of the joint estate.[3]

§ 865. **Joint-tenant may not devise.** — But a devise by one joint-tenant of his share will be inoperative, inasmuch as the right of survivorship takes precedence of such devise. And so far does this principle prevail, that if such devisor be himself the survivor, he must republish his will after the survivorship has accrued, in order to give it effect.[4]

§ 866. **Trustees as Joint-tenants.** — As a general proposition, estates given to two or more trustees will be held by them as joint-tenants, and will go to the survivor, nor will the heirs of any but the survivor be entitled to hold any interest in the joint estate.[5] And this will be found to apply in most of the States, even where the right of survivorship as to ordinary joint estates has been abolished by law.[6] But conveyances are often made, in such cases, with an intention to create a joint-tenancy, which fails, when technically considered, to answer that end. Thus deeds and devises are often made to two or more, and to the survivor of them and his heirs, the effect of which is to make them joint-tenants for life, with a contingent remainder in fee to the one who survives.[7]

§ 867. **Unequal Shares — Rule in Equity.** — It is a rule in equity, that if an estate be conveyed to several in unequal shares, in

[1] Wms. Real Prop. 112, 113; 2 Prest. Abst. 61; Rector *v.* Waugh, 17 Mo. 13.

[2] Eustace *v.* Scawen, Cro. Jac. 696; Chester *v.* Willan, 2 Saund. 96.

[3] York *v.* Stone, 1 Salk. 158; s. c. 1 Eq. Cas. Abr. 293; Simpson *v.* Ammons, 1 Binn. 175.

[4] Duncan *v.* Forrer, 6 Binn. 193; 2 Prest. Abst. 67; Lit. § 287. In Co. Lit. 185 *b*, the rule of law is stated *jus accrescendi præfertur ultimæ voluntati.*

[5] Hill, Trust. 303, and Wharton's note of Am. cases; Wms. Real Prop. 111; Rabe *v.* Fyler, 10 S. & M. 440; Webster *v.* Vandeventer, 6 Gray, 428, the case of an assignment of a mortgage to trustees.

[6] Parsons *v.* Boyd, 20 Ala. 112; Wms. Real Prop. 111, Rawle's note.

[7] Vick *v.* Edwards, 3 P. Wms. 372; Co. Lit. 191, Butler's note, 78; Ewing *v.* Savary, 3 Bibb, 235; Watkins, Conv. (White's ed.) 208, n.

consequence of their having contributed unequally towards the purchase, they become tenants in common, and not joint-tenants.[1]

§ 868. **Dower and Curtesy.**— There can be neither dower nor curtesy of an estate held in joint-tenancy, the right of the survivor taking precedence of that of the husband or the wife of the deceased co-tenant.[2]

§ 869. **How Joint-tenancies dissolved.** — There are various ways of terminating joint-tenancies, some of which have already been spoken of; as by the estate being wholly vested in one by survivorship, or being changed into a tenancy in common, by alienation of his share by one of the tenants. So it might have been by voluntary partition of the estate among the co-tenants, each taking his part, to be held thereafter in severalty without any right of survivorship. But there was no compulsory process by the common law to effect such partition, nor was it supplied until the 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32. An illustration of the effect of a partition is, that if there are two joint-tenants for life, and partition be made between them, the reversioner, instead of having to wait till the death of both before entering upon any part of the estate, may enter and possess himself of the part of either immediately upon his decease, and will hold that in severalty.[3]

[1] Tud. Cas. 721; Burton, Real Prop. § 1524, n.

[2] Co. Lit. 37 *b*.

[3] 2 Flint. Real Prop. 334.

CHAPTER XXXIV.

COPARCENARY.

§ 870. Coparcenary defined.
871. Nature of the estate.
872. Tenant in coparcenary may be his own parcener.
873. Of conveyance by coparceners.
874. Coparceners may devise.
875. When heirs take as tenants in common.

§ 870. **Coparcenary defined.** — The term is applied to estates of which two or more persons form one heir, as is the case in England, where, in the absence of sons, several daughters together form the heir to the ancestor's estates ; or where several sons take as one heir by the custom of gavelkind.[1]

§ 871. **Nature of the Estate.** — While joint-tenancies refer to persons, the idea of coparcenary refers to the estate. The title to it is always by descent. The respective shares may be unequal, as, for instance, one daughter and two granddaughters, children of a deceased daughter, may take by the same act of descent. As to strangers, the tenants' seisin is a joint one, but, as between themselves, each is seised of his or her own share, on whose death it goes to the heirs, and not by survivorship.[2] The right of possession of coparceners is in common, and the possession of one is, in general, the possession of the others.[3]

§ 872. **Tenant in Coparcenary may be his own Parcener.** — The relation of a tenant to the estate may be such, that he may be a parcener with himself, as, for instance, where one half of an estate descends to him from the father, and one half from the mother. If, in such case, he die without lineal descendants,

[1] 2 Bl. Com. 188.

[2] 2 Bl. Com. 188 ; Watkins, Conv. 143, Coventry's note; Purcell *v.* Wilson, 4 Gratt. 16.

[3] 1 Prest. Est. 137 ; Manchester *v.* Doddridge, 3 Ind. 360 ; 2 Prest. Abst. 70.

the half of the estate that came to him from his father descends to his father's heirs, while the other descends to the heirs of his mother.[1]

§ 873. **Of Conveyance by Coparceners.** — One parcener might convey his share to a third person, who would become thereby a tenant in common with the other parceners as to such share. But to do this, a deed of feoffment, or grant with words of inheritance, was requisite in order to convey a fee. Whereas, by a deed of release, one parcener might convey to his coparcener, and a fee might be created without words of inheritance, since he already has a seisin in fee of the estate by descent.[2] One *præcipe* to recover the estate lay against them all.[3]

§ 874. **Coparceners may devise.** — One parcener may dispose of his share by his last will, nor will a devise thus made be affected by his subsequently making a partition of the estate.[4]

§ 875. **When Heirs take as Tenants in common.** — But as in some of the States children and heirs take by descent expressly as tenants in common, and as such is constructively the effect of a descent in most if not all the States, the distinction of estates in coparcenary is of comparatively little practical importance, and properly gives place to the familiar form of joint estates in universal use, tenancy in common.*

* Note. — In Maryland, children take the estates of parents in fee, as coparceners. Hoffar *v.* Dement, 5 Gill, 132.

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[1] Watkins, Conv. 145, Coventry's note.

[2] Co. Lit. 273 *b*; Rector *v.* Waugh, 17 Mo. 13; Watkins, Conv. 145, Coventry's note: 1 Prest. Est. 138; Gilpin *v.* Hollingsworth, 3 Md. 190.

[3] Co. Lit. 174 *a*.

[4] 2 Prest. Abst. 72.

CHAPTER XXXV.

TENANCY IN COMMON.

§ 876. Definition.
877. Nature of tenancy in common.
878. How created.
879. Curtesy and dower.
880. Conveyances by tenants in common.
881. Lease by tenants in common.
882. Duty of one co-tenant to the others.
883. Disseisin between tenants in common.
884. Partition by adverse possession.
885. Trespass *quare clausum* against co-tenant.
886. Peculiarity about ejectment suits.
887. Other actions for torts.
888. Of waste.
889. Remedy for cutting timber.
890. When co-tenant liable for rents.
891. Not liable for his own occupation.
892. When co-tenant liable for rent.
893. Ownership of crops.
894. Improvements and repairs.
895. How contribution enforced.
896. Actions against strangers — Parties.

§ 876. **Definition.** — A tenancy in common is where two or more hold possession of lands or tenements at the same time by several and distinct titles. The quantities of their estate may be different, their proportionate shares of the premises may be unequal, the modes of acquiring these titles may be unlike, and the only unity between them be that of possession. Thus one may hold in fee, and another for life; one may acquire his title by purchase, and another by descent; one may hold a fifth, and another a twentieth, and the like.[1] And there may be a tenancy in common among several owners of a remainder.[2]

[1] 2 Bl. Com. 191; 1 Prest. Est. 139; Co. Lit. 189; Lit. § 292; 2 Flint. Real Prop. 345.

[2] Coleman *v.* Lane, 26 Ga. 515.

§ 877. **Nature of Tenancy in common.** — Each owner in respect to his share has all the rights, except that of sole possession, which a tenant in severalty would have; and if he wishes to convey his share to his co-tenant, he must do so by the same kind of deed that would be necessary to convey it to a stranger. A mere technical release would not, as in cases of joint-tenancy and coparcenary, have that effect.[1] He may manage his part of the estate as he pleases, provided he does not injure his co-tenant in so doing.[2] But if he build buildings, or make improvements upon the common property, he may not charge them to his co-tenant, though, as will appear hereafter, sometimes partition of the estate is so made as to give him such improvements.[3] On the other hand, where one co-tenant cut timber upon the common estate, and sawed it into fencing materials at a mill upon the estate, and used it for constructing fences and making repairs upon the same, it was held that his co-tenant had no claim upon him for the property so taken and used.[4]

§ 878. **How created.** — In this country, wherever two or more persons acquire the same estate by the same act, deed, or devise, and no indication is therein made to the contrary, they will hold as tenants in common.[5] Thus, where commissioners confirmed claims to the same land to two different persons, they took equal shares in common,[6] and the same would be the effect of two simultaneous conveyances to different persons.[7] So where two creditors made simultaneous levies on land, as they took at the same time with equal rights, they were held to be tenants in common in equal

[1] Co. Lit. 193 *a*, n. 80; 2 Flint. Real Prop, 349; 2 Prest. Abst. 77. For the rights of joint owners of a lake for sailing, fishing, and the like, see Menzies *v.* Macdonald, 36 E. L. & Eq. 20.

[2] Peabody *v.* Minot, 24 Pick. 329, 333.

[3] Thurston *v.* Dickinson, 2 Rich. Eq. 317; *post*, § 919.

[4] Walker *v.* Humbert, 55 Penn. St. 408.

[5] Miller *v.* Miller, 16 Mass. 59; Gilman *v.* Morrill, 8 Vt. 71; Martin *v.* Smith, 5 Binn. 16; Partridge *v.* Colegate, 3 Har. & McH. 339; Briscoe *v.* McGee, 2 J. J. Marsh. 370; Wiswall *v.* Wilkins, 5 Vt. 87; Evans *v.* Brittain, 3 S. & R. 135; Hoffman *v.* Lyons, 5 Lea, 377.

[6] Challefoux *v.* Ducharme, 8 Wis. 287.

[7] Young *v.* DeBruhl, 11 Rich. 638. See Clark *v.* Brown, 3 Allen, 509; Aldrich *v.* Martin, 4 R. I. 520, case of two mortgages.

shares.[1] So if several persons take by descent.[2] If one joint-tenant convey his share of the estate to a stranger, the alienee and the other tenant become tenants in common, as has been before stated, and the same would be the effect if one who held in severalty were to convey one-half or any other share of his estate to another, without designating the part by metes and bounds; that is, he would become tenant in common with his alienee.[3] So if the owner of a parcel of land convey so many acres of it to one, and so many to another, amounting together to the full number of acres in the parcel, his grantees would take, as tenants in common, the shares which their respective number of acres bore to the entire parcel.[4] So where A granted one acre of woodland, lying in common with his other woodland, it was held to be such an aliquot part of his woodland in common as one acre would be to the whole woodland owned by the grantor.[5] And, upon a similar principle, where a deed of a given quantity of land, parcel of a larger tract, does not locate it by its description, the purchaser becomes a tenant in common, *pro rata*, in the whole parcel.[6]

§ 879. **Curtesy and Dower.** — The husband or wife of a tenant in common of an estate of inheritance is entitled to curtesy or dower out of the share of such co-tenant.[7]

§ 880. **Conveyances by Tenants in common.** — Although each tenant in common has so general a power of alienation of his share, and may convey any aliquot portion of his share, yet, as a general proposition, he may not convey his share in any particular part of the estate so held by metes and bounds, if objected to by his co-tenant,[8] though it would be valid and effectual as against himself and all persons claiming under

[1] Shove *v.* Dow, 13 Mass. 529; Cutting *v.* Rockwood, 2 Pick. 443; Durant *v.* Johnson, 19 Pick. 544; Sigourney *v.* Eaton, 14 Pick. 414.

[2] Johnson *v.* Harris, 5 Hayw. (Tenn.) 113; 4 Kent, Com. 367.

[3] Lit. § 299; Adams *v.* Frothingham, 3 Mass. 352.

[4] Preston *v.* Robinson, 24 Vt. 583. See *post*, § 2297.

[5] Jewett *v.* Foster, 14 Gray, 496; Phillips *v.* Tudor, 10 Gray, 82; Battel *v.* Smith, 14 Gray, 497; Gibbs *v.* Swift, 12 Cush. 393; Small *v.* Jenkins, 16 Gray, 158.

[6] Schenck *v.* Evoy, 24 Cal. 110; Jackson *v.* Livingston, 7 Wend. 136; Lick *v.* O'Donnell, 3 Cal. 63; *post*, § 2297 *et seq.*

[7] 2 Flint. Real Prop. 347.

[8] Marks *v.* Sewall, 120 Mass. 174.

him. And the reason is, that such a conveyance impairs the rights of his co-tenant in respect to partition. Instead of giving him his share together in one parcel, by a single partition, it would require him to have several, and to take his share in as many distinct parcels. And, by analogy, the same rule applies when the share of a tenant in common is set off to satisfy an execution against him.[1]* The grant of a specific portion of a larger joint estate, or the levy of an execution on such portion, conveys no interest in common to the grantee or creditor in the general estate.[2] Thus, where one tenant in common of a larger lot conveyed sixty-four rods thereof, it was held to pass nothing, it being without bounds, and not to be held in common with the lot generally.[3] So in a deed of one co-tenant's share of the common estate, a reservation of his share of the mines in the same would be void.[4] Nor can one of several joint owners of land dedicate it to the public.[5] Nor can he create an easement upon or over the common estate. Nor, if he owns land adjoining the common estate, can he so use the latter in connection with the former as to acquire an easement over the common estate in favor of his private estate, though he might estop himself from claiming damages if the use is made by another.[6] Where one has conveyed a specific part of an estate, of which he is tenant in

* Note. — In Ohio and Maryland, a tenant in common may convey his share in a particular part of the estate, and a levy may be made in the same manner. Trout v. Emerick, 6 Ohio, 391; White v. Sayre, 2 Ohio, 110; Reinicker v. Smith, 2 Har. & J. 421.

1 Brown v. Bailey, 1 Met. 254; Peabody v. Minot, 24 Pick. 329; Bartlet v. Harlow, 12 Mass. 348; Baldwin v. Whiting, 13 Mass. 57; Rising v. Stannard, 17 Mass. 282; Griswold v. Johnson, 5 Conn. 363; Duncan v. Sylvester, 24 Me. 482; Jewett v. Stockton, 3 Yerg. 492; Varnum v. Abbot, 12 Mass. 474; Nicholson v. Small, 22 Pick. 316; Jeffers v. Radcliff, 10 N. H. 242; Stanford v. Fullerton, 18 Mo. 239; Smith v. Knight, 20 N. H. 9; Challefoux v. Ducharme, 4 Wis. 554; Great Falls Co. v. Worster, 15 N. H. 412; Whitton v. Whitton, 38 N. H. 127; McKey v. Welch, 22 Tex. 390; Good v. Coombs, 28 Tex. 51; Blossom v. Brightman, 21 Pick. 283, 285; Primm v. Walker, 38 Mo. 97; but see Barnhart v. Campbell, 50 Mo. 590.

2 Soutter v. Porter, 27 Me. 405; Great Falls Co. v. Worster, 15 N. H. 412.

3 Phillips v. Tudor, 10 Gray, 82; *post*, § 2297 *et seq.*

4 Adam v. Briggs Iron Co., 7 Cush. 361.

5 Scott v. State, 1 Sneed, 629; Holcomb v. Coryell, 11 N. J. Eq. 518; Dorn v. Dunham, 24 Tex. 376.

6 Crippen v. Morss, 49 N. Y. 67.

common with others, the conveyance may be made good by the other co-tenants releasing to him their interest in such portion. Or, if partition be made, the portion thus conveyed falls to him as a part of all his property.[1] The court of Michigan hold that a conveyance by one co-tenant of a specific part of the land held in common with others would be good as to all persons except his co-tenants, and only voidable as to them where it works an injury to them, and cite cases from Virginia and New Jersey as sustaining the same doctrine.[2] But they hold unqualifiedly, that, if there are co-tenants of separate and distinct parcels of estate, it is competent for one of them to convey his interest in one of these to the exclusion of the others, or his creditor might levy his execution upon the debtor's interest in one or more of these as separate estates,[3] and refer to Peabody *v.* Minot,[4] as sustaining the same doctrine.

§ 881. **Lease by Tenants in common.** — So distinct is the interest of one tenant in common from that of his co-tenant, that, if they join in making a lease, it is regarded as a demise by each of his own part.[5]

§ 882. **Duty of one Co-tenant to the others.** — But their possession being common, and each having a right to occupy, not only will such possession, though held by one alone, be presumed not to be adverse to his co-tenant, but it is, ordinarily, held to be for the latter's benefit, so far as preserving his title thereto, the possession of one tenant in common being deemed to be the possession of all.[6] It was held to be

[1] Johnson *v.* Stevens, 7 Cush. 431 ; Cox *v.* McMullin, 14 Gratt. 84 ; Camoron *v.* Thurmond, 56 Tex. 27 ; Boggess *v.* Meredith, 16 W. Va. 1 ; Barnhart *v.* Campbell, 50 Mo. 599. In other States the courts only recognize such grantee as a necessary party to a partition. Harlan *v.* Langham, 69 Penn. St. 238 ; Whitton *v.* Whitton, 38 N. H. 133.

[2] Campau *v.* Godfrey, 18 Mich. 39 ; Robinett *v.* Preston, 2 Robin. 273 ; McKee *v.* Barley, 11 Gratt. 340 ; Holcomb *v.* Coryell, 11 N. J. Eq. 548 ; and see preceding note. In California the same rule has been fully adopted. Gates *v.* Salmon, 35 Cal. 588 ; Sutter *v.* San Francisco, 36 Cal. 115.

[3] Butler *v.* Boys, 25 Mich. 53, 58.

[4] 24 Pick. 329.

[5] 2 Prest. Abst. 77 ; *post*, § 896. Cf. McKinley *v.* Peters, 111 Penn. St. 283.

[6] Co. Lit. 199 *b* ; Colburn *v.* Mason, 25 Me. 434 ; German *v.* Machin, 6 Paige, 288 ; Lloyd *v.* Gordon, 2 Har. & McH 254 ; Brown *v.* Wood, 17 Mass. 68 ; Barnard *v.* Pope, 14 Mass. 434 ; Catlin *v.* Kidder, 7 Vt. 12 ; M'Clung *v.* Ross, 5 Wheat.

a fraud in one co-tenant to suffer the common property to be sold for taxes, and to purchase it in himself;[1] and if he do so, the tax title enures to the common benefit.[2] But this would only apply where the land is assessed as a whole. If the interests of the co-tenants are separately assessed, one may buy at tax sale the undivided interest of another.[3] Nor can one co-tenant sue another to try the title to the lands in question, unless he shall have been disseised and kept out of possession by the defendant;[4] and inasmuch as one has an equal right with the other to hold the papers or documents relating to the common estate, the one out of possession of these cannot maintain any action against the other for the recovery of them.[5]

§ 883. **Disseisin between Tenants in common.** — But a tenant in common may be disseised by his co-tenant's actually ousting or holding him out of possession under a claim of an exclusive right of possession, and a repudiation of the right of the tenant, but this must be known expressly, or by implication to the tenant.[6] One tenant in common may maintain

116; Allen *v.* Hall, 1 McCord, 131; Thomas *v.* Hatch, 3 Sumn. 170; Clymer *v.* Dawkins, 3 How. 674; Poage *v.* Chinn, 4 Dana, 50; Story *v.* Saunders, 8 Humph. 663; Thornton *v.* York B'k, 45 Me. 158.

[1] Brown *v.* Hogle, 30 Ill. 119; Bender *v.* Stewart, 75 Ind. 88; Van Omer *v.* Harley, 102 Iowa, 150; s. c. 71 N. W. Rep. 241. An interesting decision, dependent, however, on the facts of the case, held one co-tenant, who received a bonus for consenting to a sale, accountable to his co-tenants for their *pro rata* share of such bonus. Garr *v.* Boswell (Ky.), 38 S. W. Rep. 513. So where the possessory title was in several, and one of them bought in the legal fee. Boskowitz *v.* Davis, 12 Nev. 446.

[2] Flinn *v.* McKinley, 44 Iowa, 68; Austin *v.* Barrett, id. 488; Allen *v.* Poole, 54 Miss. 323; unless special circumstances exist to rebut the co-tenant's claim, King *v.* Rowan, 10 Heisk. 675; *ante*, § 859.

[3] Bennet *v.* North Colo. Springs L. & Imp. Co., 23 Colo. 470; s. c. 48 Pac. Rep. 812; Roberts *v.* Thorn, 25 Tex. 728; s. c. 78 Am. Dec. 552.

[4] Martin *v.* Quattlebam, 3 McCord, 205.

[5] Clowes *v.* Hawley, 12 Johns. 484.

[6] Bracket *v.* Norcross, 1 Me. 89; Doe *v.* Bird, 11 East, 49; Dexter *v.* Arnold, 3 Sumn. 152; Harpending *v.* Dutch Ch., 16 Pet. 455; Willison *v.* Watkins, 3 Pet. 52; Gray *v.* Givens, Riley, Ch. (S. C.) 41; Jackson *v.* Tibbits, 9 Cow. 241; M'Clung *v.* Ross, 5 Wheat. 116; Norris *v.* Sullivan, 47 Conn. 474; Culver *v.* Rhodes, 87 N. Y. 348; Gross *v.* Washington (Tenn. Ch. App.), 38 S. W. Rep. 442; Gist *v.* East, 16 Tex. Civ. App. 274; s. c. 41 S. W. Rep. 396; Weigel *v.* Schick, 113 Mich. 22; s. c. 71 N. W. Rep. 323; Hutson *v.* Hutson, 139 Mo. 229; s. c. 40 S. W. Rep. 886.

a process for forcible entry and detainer against another co-tenant who has evicted him from the premises.[1] But it is difficult to determine by any fixed rule what constitutes a disseisin, especially between tenants in common. The possession of one is the possession of all, unless by an actual ouster or an exclusive pernancy of profits, against the will of the others, one shall manifest an election to hold the land by wrong, rather than by a common title.[2] And this would be true, so far as the exclusive occupation extended, although it be only a part of the entire common estate.[3] But mere separate occupancy, however long continued, would not affect the rights of the other co-tenants, unless intended to be in exclusion of these, with a view of thereby gaining an adverse right. Thus, where after the death of the father, the several children left the homestead one after another, except one, who continued to occupy and manage it from 1778 to 1822, it was held that such occupancy had nothing adverse in it, and gained no exclusive title for the occupant.[4] Among the acts which have been held to be evidence of a disseisin of one co-tenant by another, is the conveyance of the entire estate by deed to a third party, who enters and occupies the same under such deed.[5] So where one of two co-tenants devised the entire estate by a will to which the other was an attesting witness, and the devisee took possession, it was held to be a disseisin of the co-tenant.[6] And an open and exclusive possession may be so long continued as to be evidence of an original ouster. This was held in one case, where such

[1] Presbrey *v.* Presbrey, 13 Allen, 284. Cf. Byam *v.* Bickford, 140 Mass. 31.

[2] Munroe *v.* Luke, 1 Met. 459; Barnard *v.* Pope, *supra;* Small *v.* Clifford, 38 Me. 213; Corbin *v.* Cannon, 31 Miss. 570; Roberts *v.* Morgan, 30 Vt. 319; Forward *v.* Deetz, 32 Penn. St. 69; Hoffstetter *v.* Blattner, 8 Mo. 276; Meredith *v.* Andres, 7 Ired. 5; Peck *v.* Ward, 18 Penn. St. 506; Abercrombie *v.* Baldwin, 15 Ala. 363; Johnson *v.* Swaine, Busbee (N. C.), 335; Brock *v.* Eastman, 28 Vt. 658; Owen *v.* Morton, 24 Cal. 377, 379; M'Clung *v.* Ross, 5 Wheat. 124.

[3] Carpentier *v.* Webster, 27 Cal. 524, 560; Bennett *v.* Clemence, 6 Allen, 10.

[4] Campbell *v.* Campbell, 13 N. H. 483.

[5] Bogardus *v.* Trinity Ch., 4 Paige, 178; Bigelow *v.* Jones, 10 Pick. 161; Weisinger *v.* Murphy, 2 Head, 674; Thomas *v.* Pickering, 13 Me. 337; Burton *v.* Murphy, 2 Tayl. 259; Gill *v.* Fauntleroy, 8 B. Mon. 177; Higbee *v.* Rice, 5 Mass. 344, 352; Hinkley *v.* Greene, 52 Ill. 230; Culler *v.* Motzer, 13 S. & R. 356.

[6] Miller *v.* Miller, 60 Penn. St. 16, 22.

occupation had been for thirty-six years without accounting for rents or profits. In another case, the holding had been for forty years, while in another twenty-one years were held sufficient.[1] So the flowing of the common land by one of the tenants in common may be equivalent to an ouster of his co-tenants.[2] And where the possession is sole, and under a claim adverse to the co-tenant, the statute of limitations begins to run as to all the land held in common by them.[3]

§ 884. **Partition by Adverse Possession.** — If two co-tenants divide their land, and each enters upon his allotted share and occupies it separately, and to the exclusion of the other, for the period of statute limitation, it will operate as a bar to the claim of either upon the other for the part so occupied by the latter.[4]

§ 885. **Trespass quare clausum against Co-tenant.** — The rule is general and well nigh imperative that one tenant in common may not have trespass *quare clausum* against another. It can never be done unless the party charged has done something inconsistent with the rights of the other co-tenant in the premises.[5] The act complained of must amount to an unequivocal eviction from,[6] or destruction of, the property itself, or some part of it.[7] Whether, when two tenants in

[1] Doe *v.* Prosser, Cowp. 217; Jackson *v.* Whitbeck, 6 Cow. 632; Frederick *v.* Gray, 10 S. & R. 182; Mehaffy *v.* Dobbs, 9 Watts, 363; and in Hutson *v.* Hutson, 139 Mo. 229; s. c. 40 S. W. Rep. 886, open, notorious acts continued for twenty years, and evidencing an intention to claim exclusive ownership, was held sufficient to constitute an ouster.

[2] Jones *v.* Weathersbee, 4 Strobh. 50; Great Falls Co. *v.* Worster, 15 N. H. 412.

[3] Hubbard *v.* Wood, 1 Sneed, 279. See Mehaffey *v.* Dobbs, 9 Watts, 363; Larman *v.* Huey, 13 B. Mon. 436; Black *v.* Lindsay, Busbee (N. C.), 167, where the holding had been but twenty years. Noble *v.* McFarland, 51 Ill. 226. Where a railroad company was tenant in common of land with other owners, its co-tenants being a tenant for life and a reversioner in fee, and it purchased the life interest of the co-tenant and then laid its railroad across it, it was held that it had not, by so doing, so ousted the reversioner that, upon the death of the tenant for life, he could maintain ejectment against the railroad company. Austin *v.* Rutland, etc. R. R., 45 Vt. 215.

[4] Rider *v.* Maul, 46 Penn. St. 276.

[5] Jones *v.* Chiles, 8 Dana, 163; McPherson *v.* Seguine, 3 Dev. 153; Lawton *v.* Adams, 29 Ga. 273.

[6] Filbert *v.* Hoff, 42 Penn. St. 97.

[7] Bennet *v.* Bullock, 35 Penn. St. 364; Jewett *v.* Whitney, 43 Me. 212; Maddox *v.* Goddard, 15 Me. 218; Silloway *v.* Brown, 12 Allen, 37; Stevens

common agree that one shall occupy a part of the land in severalty and the other enters without his consent, trespass *quare clausum* will lie has been differently decided.[1] Trespass, however, lies to recover mesne profits, where one tenant has prevailed against another in a real action to recover his share of a common estate.[2] Mesne profits are only recoverable in England in trespass *quare clausum* after a judgment in ejectment. In this country, in several of the States, they form a part of the judgment recovered in actions for the recovery of the land; and in Vermont and Massachusetts damages may also be recovered beyond these for acts done by the tenant while wrongfully in possession.[3] But mesne profits may not be recovered beyond six years or the limitation of an action of trespass.[4] Trespass or ejectment, at his election, lies in favor of one co-tenant against another who has actually expelled or ousted him from the premises. But not for merely taking the crops raised upon the common land.[5] Nor for cutting trees upon the common estate. Nor, generally, for an entry upon and enjoyment of the common property.[6]

§ 886. **Peculiarity about Ejectment Suits.** — [Not only is one tenant in common estopped to buy in an outstanding paramount title and set it up against his co-tenant, but he may not have the advantage of an outstanding paramount title when sued in ejectment by his co-tenant. This works what may seem an apparent exception to the general rule that the plaintiff must recover on the strength of his own title and not on the weakness of the defendant's, — a rule which, in other

v. Smith, 8 Ellis & B. 1; Erwin *v.* Olmsted, 7 Cow. 229; McGill *v.* Ash, 7 Penn. St. 397; Booth *v.* Adams, 11 Vt. 156.

[1] *Pro*, Keay *v.* Goodwin, 16 Mass. 1; *contra*, McPherson *v.* Seguine, 3 Dev. 153.

[2] Bennet *v.* Bullock, 35 Penn. St. 367; Goodtitle *v.* Tombs, 3 Wils. 118. See Marsh *v.* Hammond, 103 Mass. 150, for the rule of admeasuring the damages recoverable as mesne profits. Sears *v.* Sellew, 28 Iowa, 506, 507; Lane *v.* Harrold, 72 Penn. St. 267.

[3] Lippett *v.* Kelley, 46 Vt. 524, 525; Mass. Pub. Stat. c. 173, § 12.

[4] Hill *v.* Meyers, 46 Penn. St. 15.

[5] Murray *v.* Hall, 7 C. B. 441, 454; Silloway *v.* Brown, 12 Allen, 37. And in an action of ejectment the plaintiff may recover damages and mesne profits, while the defendant may recover for his betterments in such action. Backus *v.* Chapman, 111 Mass. 388.

[6] Hastings *v.* Hastings, 110 Mass. 285.

cases, allows the defendant to prevail by showing outstanding true title in a third person.[1]]

§ 887. **Other Actions for Torts.** — If one co-tenant misuse or destroy the common property, his co-tenant may have an action against him for such misfeasance. But to render him liable as a tort feasor, he must do something more than exercise mere acts of ownership over it, or claim it as his own.[2] Thus, where one co-tenant of a mill, while in the sole occupation of it, suffered it to be destroyed by his negligence, it was held that he was liable to the other co-tenants for such destruction.[3] Such is the case where one co-tenant of a mill erected a dam below the same on his own private land, and flowed back upon the common mill to its injury,[4] or authorized another to do this, or to divert the waters of the stream from the common mill.[5] And where one co-tenant of a well attempted to go down into it to examine if it was clean, and the other prevented him, the latter had a right of action for such obstruction.[6]

§ 888. **Of Waste.** — One tenant in common may have an action of waste against his co-tenant, under the statute of Westminster II. c. 22, for waste done on the premises, and by statute, or at the common law, in the several States.[7] And so held in New York, if, by the act complained of, the inheritance is permanently injured.[8] And if one co-tenant, while in possession of the whole estate by consent of the others, threaten to commit wilful waste, which would work an irremediable mischief, chancery will interfere to enjoin him.[9]

1 Braintree *v.* Battles, 6 Vt. 395.

2 Martin *v.* Knowlys, 8 T. R. 146; Wilbraham *v.* Snow, 2 Saund. 47, n. f, g; Farr *v.* Smith, 9 Wend. 338; Co. Lit. 200; Hyde *v.* Stone, 9 Cow. 230; Lightmaster *v.* Beasly, 7 J. J. Marsh. 410; Gilbert *v.* Dickerson, 7 Wend. 449, Tallman *v.* Richardson, 6 Vt. 442; Harman *v.* Gartman, Harper, 430.

3 Chesley *v.* Thompson, 3 N. H. 9.

4 Odiorne *v.* Lyford, 9 N. H. 502; Hutchinson *v.* Chase, 39 Me. 508; Pillsbury *v.* Moore, 44 Me. 154.

5 Hines *v.* Robinson, 57 Me. 328.

6 Newton *v.* Newton, 17 Pick. 201.

7 Co. Lit. 200 *b*; 4 Kent, Com. 369, n.; Matts *v.* Hawkins, 5 Taunt. 20; Anders *v.* Meredith, 4 Dev. & B. 199; Shiels *v.* Stark, 14 Ga. 429.

8 Elwell *v.* Burnside, 44 Barb. 454. See McCord *v.* Oakland Q. M. Co., 54 Cal. 134.

9 Twort *v.* Twort, 16 Ves. 128, 132.

§ 889. **Remedy for cutting Timber.** — If one tenant cut timber growing upon the common land, and sell the same and convert it into money, the co-tenants may recover of him their respective shares of the proceeds of such sale.[1]

§ 890. **When Co-tenant liable for Rents.** — So in some cases, one tenant in common may recover from his co-tenant a share of the rents and profits of the common estate. But in order to charge a co-tenant for such rents, he must either have been made the bailiff of the other tenant, and then he would be liable at common law, or he must have received more than his share of the rents and profits of the estate, in which case he is liable under the statute 4 Anne, c. 16.[2] And this seems to be the law generally in the United States.[3] The same rule would apply though the tenant who occupies the whole premises were himself the lessee of one of the tenants in common, if he had not attorned to the other co-tenants.[4] If one tenant in common sell hay or grass growing upon the common estate, he may recover therefor, although his co-tenant forbids the purchaser to pay him. It is a mode of occupying the estate which he may exercise if he do not prevent his co-tenant from occupying with him.[5]

§ 891. **Not liable for his own Occupation.** — One co-tenant may be liable to another for rent, or for use and occupation under an express demise,[6] but there must be something more than an occupancy of the estate by one and a forbearance to occupy by the other. The tenant who merely occupies

[1] Miller *v.* Miller, 7 Pick. 133.

[2] Co. Lit. 199 *a*, and Butler's note 83 ; Peck *v.* Carpenter, 7 Gray, 283 ; Pico *v.* Columbet, 12 Cal. 414 ; the statute of Anne is not in force there. Israel *v.* Israel, 30 Md. 126 ; Gregory *v.* Connolly, 7 U. C. Q. B. 500.

[3] Jones *v.* Harraden, 9 Mass. 540 ; Brigham *v.* Eveleth, 9 Mass. 538; Sargent *v.* Parsons, 12 Mass. 149 ; Shiels *v.* Stark, 14 Ga. 429 ; Huff *v.* M'Donald, 22 Ga. 131 ; Shepard *v.* Richards, 2 Gray, 424; Gowen *v.* Shaw, 40 Me. 56 ; Dickinson *v.* Williams, 11 Cush. 258 ; Munroe *v.* Luke, 1 Met. 459, 463 ; Izard *v.* Bodine, 11 N. J. Eq. 403; Webster *v.* Calef, 47 N. H. 289.

[4] Badger *v.* Holmes, 6 Gray, 118.

[5] Brown *v.* Wellington, 106 Mass. 318.

[6] Cowper *v.* Fletcher, 6 B. & S. 464 ; Leigh *v.* Dickeson, 12 Q. B. D. 194 ; even after the lease expires, ibid. ; Bayley *v.* Bradley, 5 C. B. 696 ; Elliott *v.* Knight, 64 Ill. App. 87.

the estate does no more than he has a right to do on his own account.[1]

§ 892. **When Co-tenant liable for Rent.** — [But while a tenant in common cannot be made to pay rent to his co-tenant for permissive sole occupation of the land, he is liable to account for what he *receives* as rental for the land.[2] And if he ousts his co-tenant and occupies adversely to him, he is liable for rent.[3] But there are authorities which hold that while a co-tenant who has not been excluded and who has simply neglected to take his share of profit from the land, cannot hold his co-tenant in possession accountable for what he has taken, more than his own share; any exclusive appropriation of the profits of the land, whether they arise from rents or from use, renders the tenant in possession accountable therefor. So,] in Vermont, where one of several co-tenants of land converted it into a race-course, out of which he made a profit, and to prepare it cut down and used trees growing upon it, it was held he was liable to account both for the timber and the profits of the race-course.[4] [But upon such an accounting the co-tenant who has thus exclusively

[1] Sargent *v.* Parsons, 12 Mass. 149; Calhoun *v.* Curtis, 4 Met. 413; Norris *v.* Gould, 15 W. No. Cas. 187; Keisel *v.* Earnest, 21 Penn. St. 90; Kline *v.* Jacobs, 68 Penn. St. 57; Israel *v.* Israel, 30 Md. 120; Everts *v.* Beach, 31 Mich. 136; Scott *v.* Guernsey, 60 Barb. 163; Balfour *v.* Balfour, 33 La. Ann. 297; Crow *v.* Mark, 52 Ill. 332; Lyles *v.* Lyles, 1 Hill, Ch. (S. C.) 85; Volentine *v.* Johnson, id. 49. In South Carolina, New Jersey, and New Hampshire, in equity, if one tenant occupies and cultivates and derives profit from more than his share of the estate, he must account for net excess of profits. Holt *v.* Robertson, McMullan, Ch. 475; Hancock *v.* Day, id. 298; Thompson *v.* Bostick, id. 75; Gage *v.* Gage, 66 N. H. 282; s. c. 29 Atl. Rep. 543; Edsall *v.* Merrill, 37 N. J. Eq. 114. This doctrine is disapproved in Pico *v.* Columbet, 12 Cal. 414; but a similar rule is adopted in Mississippi in cases of partition. Medford *v.* Frazier, 58 Miss. 241.

[2] Henderson *v.* Eason, 17 Q. B. 701; McMahon *v.* Burchell, 2 Phillips, 134; Jones *v.* Massey, 14 S. C. 292; Jolly *v.* Bryan, 86 N. C. 457; Holmes *v.* Bush, 58 Vt. 547; Van Ormer *v.* Harley, 120 Iowa, 150; s. c. 71 N. W. Rep. 241; McCaw *v.* Barker, 115 Ala. 543; s. c. 22 So. Rep. 131.

[3] See Van Ormer *v.* Harley, *supra*; Names *v.* Names, 48 Neb. 701; s. c. 67 N. W. Rep. 751.

[4] Hayden *v.* Merrill, 44 Vt. 336. So in Tennessee, Tyner *v.* Fenner, 4 Lea, 469; and in Maine by statute, Richardson *v.* Richardson, 72 Me. 403. And for authorities holding the tenant in possession accountable for permissive sole use, see § 891, note.

profited is entitled to an allowance for his services and expenses in producing the profits.[1]]

§ 893. **Ownership of Crops.** — Following the general rule in this country it was held that where one co-tenant was suffered to occupy the common property and to plant and raise a crop thereon without objection by the other tenant, the crop when severed became his individual property, and that if the other took it when gathered, and carried it away, or any part of it, he was thereby a trespasser.[2] But had the estate been divided between them before the crops were gathered, these would pass to the one to whose share the land on which they were growing was assigned, nor would the doctrine of emblements apply in such case in favor of the one who planted them, since a liability to have partition made is one of the incidents of such estates.[3] Where a claim does arise in favor of one tenant in common against another for occupying the common land, it is a personal one, and does not pass with the estate if such claimant grants his estate to another.[4]

§ 894. **Improvements and Repairs.** — [Independent of statute, one tenant in common cannot force his co-tenant to contribute to the cost of improvements;[5] but the expenses which one tenant is subjected to for the preservation of the common property will, in equity, be ratably apportioned among all of the tenants. The expense, therefore, of necessary repairs,[6] as well as the cost of preserving the title, as by paying off a mortgage,[7] purchasing an outstanding title,[8] paying taxes,[9] assessments, and the like, will be apportioned among the several tenants, although it was borne in the first instance by one. But while there can be no enforced contribution for

[1] Dewing *v.* Dewing, 165 Mass. 230 ; s. c. 42 N. E. Rep. 1128.

[2] Calhoun *v.* Curtis, 4 Met. 413.

[3] Ibid.

[4] Hannan *v.* Osborn, 4 Paige, 336.

[5] Crest *v.* Jack, 3 Watts, 239 ; Taylor *v.* Baldwin, 10 Barb. 582 ; Stevens *v.* Thompson, 17 N. H. 109 ; Calvert *v.* Aldrich, 99 Mass. 74, 78 ; Converse *v.* Ferre, 11 Mass. 325 ; Scott *v.* Guernsey, 48 N. Y. 106, 124 ; Israel *v.* Israel, 30 Md. 120.

[6] Coffin *v.* Heath, 6 Met. 76.

[7] Leach *v.* Hall, 95 Iowa, 611 ; s. c. 64 N. W. Rep. 790 ; Oliver *v.* Lansing, 57 Neb. 352 ; s. c. 77 N. W. Rep. 802.

[8] Carson *v.* Broady, 56 Neb. 648 ; s. c. 77 N. W. Rep. 80.

[9] Emeric *v.* Alvarado, 90 Cal. 444 ; s. c. 27 Pac. Rep. 356.

improvements, upon a partition, as will hereafter be shown, the co-tenant who has made them at his own cost will be given the benefit of them.[1]

§ 895. **How Contribution enforced.** — At common law, where a tenant in common was entitled to contribution from his co-tenant for expenses incurred in necessary repairs, or in protecting the title, he had a remedy by writ *de reparatione facienda;* but this form of action is obsolete in this country.[2] The remedy in any case is in equity. The amount found due from the defendant co-tenant upon an accounting will be declared to be a lien upon his share,[3] and if the expense be incurred in the purchase of an outstanding incumbrance, the purchasing co-tenant will be subrogated to the lien of the incumbrance to the extent of the amount to be contributed.[4] And the equity to contribution may always be adjusted in a partition suit.[5]

§ 896. **Actions against Strangers — Parties.** — As each tenant in common has a freehold separate and distinct from that of his co-tenant, they are not allowed, at common law, to join in an action to recover possession of the land from a disseisor. Each must bring his separate action.[6] But this rule of the common law has been modified in some States, either by statute or by judicial legislation, so that tenants in common may all join in an action of ejectment.[7] But in such case

[1] *Post*, § 919.

[2] Calvert *v.* Aldrich, 99 Mass. 74.

[3] Coffin *v.* Heath, 6 Met. 76; Beaty *v.* Bordwell, 91 Penn. St. 438.

[4] Titsworth *v.* Stout, 49 Ill. 78; Gee *v.* Gee, 2 Sneed, 395; Dowdy *v.* Blake, 50 Ark. 205; Oliver *v.* Lansing, 57 Neb. 352; s. c. 77 N. W. Rep. 802. *Contra*, Leach *v.* Hall, 95 Iowa, 611; s. c. 64 N. W. Rep. 790, a case which confines the lien to one for contribution denying subrogatio

[5] Calvert *v.* Aldrich, *supra.*

[6] Lit. § 311; Co. Lit. 200 *a*; Rehoboth *v.* Hunt, 1 Pick. 224; Brisco *v.* McGee, 2 J. J. Marsh. 370; Allen *v.* Gibson, 4 Rand. 468; Johnson *v.* Harris, 5 Hayw. 113; Hines *v.* Frantham, 27 Ala. 359; Hughes *v.* Holliday, 3 Greene (Iowa), 30; Young *v.* Adams, 14 B. Mon. 127.

[7] Mass. Pub. Stat. c. 173, § 7. In Connecticut they may sue jointly or severally. Hillhouse *v.* Mix, 1 Root, 246; Morris *v.* Wheat, 8 App. Cases (D. C.) 379; Burbage *v.* Fitzgerald, 98 Ga. 582; Cheney *v.* Cheney, 26 Vt. 606; Dickey *v.* Armstrong, 1 A. K. Marshall (Ky.), 39; De Mill *v.* Lockwood, 3 Blatchf. 56; Gray *v.* Givens, 26 Mo. 291; Poole *v.* Fleeger, 11 Pet. 185; Hicks *v.* Rogers, 4 Cranch, 165; Swett *v.* Patrick, 11 Me. 179.

the title must be proved as laid in all; for if the proof fail as to one plaintiff, the verdict must be for the defendant.[1] In many States one tenant in common may recover the exclusive possession as against a disseisor.[2] In others, he is confined to a recovery of his aliquot interest.[3] But where one tenant in common sues as sole owner, and his proof shows only a share as tenant in common, there is no variance, and he will recover such share in common as the proof entitles him to.[4] But as the possession of tenants in common is joint, they must join in actions for injuries to this, as trespass *q. c. f.*, nuisance, and the like;[5] although many authorities hold to the contrary.[6] To recover rent upon a joint lease, the action must be joint.[7]

[1] Chandler *v.* Simmons, 97 Mass. 508; and see cases in previous note.

[2] Moulton *v.* McDermott, 80 Cal. 629; Barrett *v.* French, 1 Conn. 354; s. c. 6 Am. Dec. 241; Sherin *v.* Larson, 28 Minn. 523; Brown *v.* Warren, 16 Nev. 228; Dolph *v.* Barney, 5 Or. 191; Sowers *v.* Peterson, 59 Tex. 216; Robinson *v.* Johnson, 36 Vt. 69; Allen *v.* Higgens, 9 Wash. 446; s. c. 43 Am. St. Rep. 847.

[3] Stream *v.* Lloyd, 128 Ill. 495; s. c. 21 N. E. Rep. 533; Dewey *v.* Brown, 2 Pick. 387; Gray *v.* Givens, 26 Mo. 291; Johnson *v.* Hardy, 43 Neb. 368; s. c. 61 N. W. Rep. 624; s. c. 47 Am. St. Rep. 765; Keefe *v.* Doreland, 16 Mont. 16; s. c. 39 Pac. Rep. 916; Mobley *v.* Bremer, 59 Penn. St. 481; s. c. 98 Am. Dec. 360; Nye *v.* Levitt, 92 Va. 710; s. c. 24 S. E. Rep. 345.

[4] McFadden *v.* Haley, 2 Bay, 457; Watson *v.* Hill, 1 McCord, 161; Dewey *v.* Brown, 2 Pick. 387. But in Illinois the plaintiff cannot recover a share when he sues for the whole estate. Winstanley *v.* Meacham, 58 Ill. 97.

[5] Austin *v.* Hall, 13 Johns. 286; Gilmore *v.* Wilbur, 12 Pick. 120; Winters *v.* McGhee, 3 Sneed, 128; Parke *v.* Kilham, 8 Cal. 77; Depuy *v.* Strong, 37 N. Y. 372; Phillips *v.* Sherman, 61 Me. 548; Galveston, H. & S. A. Ry. Co. *v.* Stockton, 15 Tex. Civ. App. 145; s. c. 38 S. W. Rep. 647; White *v.* Brooks, 43 N. H. 402.

[6] The Debris Case, 16 Fed. Rep. 25; Miss. & Mo. R. R. Co. *v.* Ward, 2 Black, 485; Hewitt *v.* Story, 12 C. C. A. 250; s. c. 64 Fed. Rep. 524; Himes *v.* Johnson, 61 Cal. 259; Water Co. *v.* Perdew, 65 Cal. 447; s. c. 4 Pac. Rep. 426; Union Mill & Mining Co. *v.* Daughberg, 81 Fed. Rep. 73. And that one co-tenant suing alone for damage to the common property may recover both his own and his co-tenant's damage, Bigelow *v.* Rising, 42 Vt. 678.

[7] Lit. § 316; Decker *v.* Livingston, 15 Johns. 479; Wall *v.* Hinds, 4 Gray, 256; Wilkinson *v.* Hall, 1 Bing. N. C. 713; *ante*, § 882.

CHAPTER XXXVI.

PARTNERSHIP ESTATES.

§ 897. Partnership estates resulting trusts.
898. Nature of the partnership estate.
899. Paramountcy of lien — Dower.
900. The lien of creditors.
901. Conveyances of partnership lands.
902. Priority of firm creditors.
903. Conveyances to partners.
904. English rule of distribution.
905. American rule of survivorship and descent.
906. Disappearance of partnership estate; legal character of surplus.

§ 897. **Partnership Estates Resulting Trusts.** — The term "partnership estates" is used to designate a certain class of resulting trusts. These particular resulting trusts are classed with joint estates because, as a usual thing, the legal title is held by all the members of a partnership as tenants in common, while in equity, the partners are considered as joint tenants for the purpose of administering the trust. But the legal title is not necessarily held by all the members as tenants in common; for it may be vested in one of the partners as tenant in severalty, in which case there is not only the resulting partnership trust, but an additional subordinate resulting trust to the partners as equitable tenants in common. The legal title may be in one or in several. As will be shown, the partners bear a twofold relation to the beneficial interest in the property; for each has a separate and distinct lien on the property for any balance which may be found to be due him on an accounting; and as to this lien his interest is purely potential: the balance on an accounting having been paid, the partners now own the residue of the beneficial interest as tenants in common.

§ 898. **Nature of the Partnership Estate.** — Land bought with partnership assets for partnership purposes is held by the

grantee or grantees of the legal estate, be he or they one of the partners, or all of them, or a third person, upon a two-fold trust, and this trust gives rise to the term "partnership estates." All partnership assets are held in trust to pay, first, the partnership debts; and then, the partnership balances.[1] The trust character of partnership funds follows them into the land, whereby the same trust is said to *result* out of the land, from its purchase with trust funds, in favor of the beneficiaries of the fund. But the property is not necessarily exhausted by these two beneficial interests, which are in the nature of liens; and as soon as these liens are satisfied by the payment of the partnership debts and the discharge of the partnership balances, equity removes the trust mantle from the property, leaving the legal estate of the owners therein subject to all the incidents of tenancy in common.[2] Where the property is taken in the name of one of the partners or of a third person, another trust results, *prima facie*, in favor of all of the partners, because they furnished the purchase-money. But this resulting trust is entirely distinct from the trust which is the partnership estate. The latter arises by a conclusive presumption of law from the application of partnership funds to the purchase of the property.[3] The former arises, *prima facie*, from the application of a common fund to the purchase; but it depends upon the intention of the owners of the fund at the time of the purchase. The presumption of this trust is rebuttable by proof that the real intention, at the time of purchase, was that the legal and the beneficial interests should be coincident.[4]

[1] Goodburn *v.* Stevens, 5 Gill. 1.

[2] Greenwood *v.* Marvin, 111 N. Y. 423; s. c. 19 N. E. Rep. 228; Loubat *v.* Nourse, 5 Fla. 350; Dyer *v.* Clark, 5 Met. 562; s. c. 39 Am. Dec. 697; Lyons *v.* McCurdy, 90 Ala. 497; s. c. 8 So. Rep. 52; Nat. Union Bank of Md. *v.* Nat. Mechanics' Bank of Baltimore, 80 Md. 371; s. c. 27 L. R. A., 476; s. c. 30 Atl. Rep. 913; Buchan *v.* Sumner, 2 Barb. Ch. 165; s. c. 47 Am. Dec. 305; Murphy *v.* Abrams, 50 Ala. 293.

[3] Greenwood *v.* Marvin, *supra*.

[4] Trephagen *v.* Burt, 67 N. Y. 30; Goldthwaite *v.* Janney, 102 Ala. 431; s. c. 15 So. Rep. 560; Page *v.* Thomas, 43 Ohio St. 38; s. c. 54 Am. Rep. 793; Rank *v.* Grote, 18 Jones & S. 502; Ware *v.* Owens, 42 Ala. 212; s. c. 94 Am. Dec. 642; Buckley *v.* Buckley, 11 Barb. 43; Fairchild *v.* Fairchild, 64 N. Y. 471; Providence *v.* Bullock, 14 R. I. 353; Holmes *v.* Self, 79 Ky. 297.

§ 899. **Paramountcy of Liens — Dower.** — The liens securing the payment of partnership debts and balances are paramount to the rights, legal or equitable, of the partners, simply as co-owners of the property; and are equally paramount to all rights incidental to those of the partners as co-owners. Thus, partnership debts and balances must be paid before a partner's widow is entitled to have dower assigned in her husband's share of the partnership land, whether his estate therein be legal or equitable; or, perhaps, it would be better to say that any assignment must be subject to the enforcement of these claims; so that the widow of a partner is in reality dowable only out of what remains of her husband's share after payment of partnership debts and balances. In this connection, partnership estates are said to be treated in equity as personal property.[1]

§ 900. **The Lien of Creditors.** — The lien of creditors upon the partnership land, however, being mere security for the payment of their claims, must not be enforced to the destruction of other rights in the land, if it can be avoided. Therefore, where the personal assets of the partnership are sufficient to pay the partnership debts, a creditor cannot seek satisfaction out of the land.[2] Moreover, the lien of creditors is not specific — it is only a *quasi* lien,[3] enforceable only in equity, as against a trust, after the personal assets have been exhausted.[4]

§ 901. **Conveyances of Partnership Lands.** — The objects of a partnership would be defeated if the partners had not the power to deal with its property. Where, therefore, in good faith, the character of the property is changed from joint to

[1] Greenwood *v.* Marvin, 111 N. Y. 423; s. c. 19 N. E. Rep. 228; Price *v.* Hicks, 14 Fla. 565; *Re* Ransom, 17 Fed. Rep. 331; Cilley *v.* Huse, 40 N. H. 358; Clay *v.* Freeman, 118 U. S. 97; Lenow *v.* Fones, 48 Ark. 556; Price *v.* Hicks, 14 Fla. 565; Trowbridge *v.* Cross, 117 Ill. 109; s. c. 7 N. E. Rep. 347; Grissom *v.* Moore, 106 Ind. 296; s. c. 55 Am. Rep. 742; Howard *v.* Priest, 5 Met. 582; Anderson *v.* Brown, 21 Ala. 437; s. c. 56 Am. Dec. 252; Woodward-Holmes Co. *v.* Nash, 38 Minn. 236; s. c. 27 L. R. A. 340; s. c. 59 N. W. Rep. 1040. See *ante*, § 877.

[2] Colgate *v.* Colgate, 23 N. J. Eq. 372; and see cases cited under § 899.

[3] Beecher *v.* Stevens, 43 Conn. 587; Guyton *v.* Flack, 7 Md. 398; Peyton *v.* Keedy, 6 B. Mon. 128; s. c. 43 Am. Dec. 160; Sands *v.* Kimbark, 27 N. Y. 147; Buchan *v.* Sumner, 2 Barb. Ch. 165; s. c. 47 Am. Dec. 305.

[4] Offutt *v.* Scott, 47 Ala. 104.

separate,[1] or is, in good faith, conveyed to a stranger,[2] the transaction will be upheld as against partnership creditors. The *quasi* lien of creditors acquires no specific character until the actual institution of suit in equity to enforce their claims.[3] And creditors who buy in good faith for a valuable consideration, knowing the land to be partnership assets, will not be held to see to the application of the purchase-money.[4] *A fortiori*, one who buys land in ignorance of the fact that it is partnership property takes it free from all liabilities of the partnership as such.[5] But if the conveyance be voluntary, or be made for the purpose of defeating partnership liabilities to one having actual notice of such intent, or to one to whom notice thereof must be imputed, the land will be held subject to the enforcement of the partnership claims.[6]

§ 902. **Priority of Firm Creditors.** — From the principles laid down, it naturally follows that the trust for partnership purposes must be fully discharged by payment of the partnership debts and the settlement of balances as between the partners before the creditors of an individual partner can be permitted to subject his share to the payment of their claims. It is only the surplus of a partner's share after all partnership obligations are discharged which stands good for his individual debts,[7] notwithstanding that such debts have been secured by a specific lien on his interest,[8] always excepting the case of a lienor who stands in the position of a *bona fide* purchaser for a valuable consideration without notice. And in this

[1] Howe *v.* Lawrence, 9 Cush. 553; s. c. 57 Am. Dec. 68; Richards *v.* Manson, 101 Mass. 482; Barkley *v.* Tapp, 87 Ind. 25; Dimon *v.* Hazard, 32 N. Y. 65.

[2] Gevin *v.* Selby, 5 Ohio St. 96.

[3] Howe *v.* Lawrence, *supra*.

[4] Lincoln *v.* White, 30 Me. 291; Megibben *v.* Perin, 49 Fed. Rep. 183; Tillinghast *v.* Champlin, 4 R. I. 173; s. c. 67 Am. Dec. 510.

[5] Tillinghast *v.* Champlin, *supra*; Parker *v.* Bowles, 57 N. H. 491.

[6] Matlack *v.* James, 13 N. J. Eq. 126; Richards *v.* Manson, 101 Mass. 482; Filley *v.* Phelps, 18 Conn. 294.

[7] Mendenhall *v.* Benbow, 84 N. C. 646; Matlack *v.* James, *supra*; Booher *v.* Perrill, 140 Ind. 529; s. c. 40 N. E. Rep. 36; Stadler *v.* Allen, 44 Iowa, 198; Hiscock *v.* Phelps, 49 N. Y. 97; Buchan *v.* Sumner, 2 Barb. Ch. 165; s. c. 47 Am. Dec. 305.

[8] Booher *v.* Perrill, *supra*; Cunningham *v.* Ward, 30 W. Va. 572.

respect it matters not whether the legal estate be in one partner or be held by a stranger in trust for the partnership. Saving the rights of *bona fide* purchasers, the legal estate must respond to partnership liabilities.[1]

§ 903. **Conveyances to Partners.** — Inasmuch as the partnership estate is a trust resulting out of the purchase of the land, it matters not what the form of the conveyance may be, or whether it is sufficient to pass the legal title. The facts being proved, equity will declare the trust and compel the execution of the proper conveyances. A deed to a name which is a mere trade mark passes nothing in law,[2] but it will be sufficient to pass an equitable estate;[3] and if it be to a firm name which contains the full name of one partner, it will pass the legal title to the partner named, who will hold it in trust for the partnership. Thus, where the conveyance was to "S. L. & Co.," S. L. took the legal estate clothed with a trust for the company.[4] The partnership estate results irrespective of the form of the deed;[5] but a deed to the partners as tenants in common or to one of the partners as tenant in severalty without mentioning the partnership estate will make it possible to evade the partnership obligations in favor of a *bona fide* purchaser; as where land was bought by a partnership, but the conveyance was made to one of the partners, and he conveyed it to one without notice, in consideration of an obligatory promise to marry him.[6]]

§ 904. **English Rule of Distribution.** — In England, courts of equity have recently been inclined to regard real estate thus held as personal, subject to the same rules of distribution as

[1] *Ex parte* Griffin, 18 Nat. Bank. Reg. 207; Christian *v.* Ellis, 1 Gratt. 396; Diggs *v.* Brown, 78 Va. 292; Fowler *v.* Bailley, 14 Wis. 125; Pierce *v.* Trigg, 10 Leigh, 406; Wheatley *v.* Calhoun, 12 Leigh, 264; s. c. 37 Am. Dec. 651.

[2] Percifull *v.* Platt, 36 Ark. 456.

[3] Dunlap *v.* Green, 60 Fed. Rep. 242; Frost *v.* Wolf, 77 Tex. 455; s. c. 14 S. W. Rep. 440.

[4] McGuire *v.* Ramsey, 4 Eng. (Ark.) 518; Moreau *v.* Saffarans, 3 Sneed, 595; Hewitt *v.* Rankin, 41 Iowa, 35; Fowler *v.* Bailley, 14 Wis. 125; King *v.* Weeks, 70 N. C. 372; Uhler *v.* Semple, 20 N. J. Eq. 288; Fairchild *v.* Fairchild, 64 N. Y. 471.

[5] Cilley *v.* Huse, 40 N. H. 358; Dyer *v.* Clark, 5 Met. 562; s. c. 39 Am. Dec. 697.

[6] Allen *v.* Smith, 5 Allen, 452.

personal estate.[1] This doctrine was applied in the case cited below, where A and B purchased land on a joint speculation with their joint moneys, for the purpose of building upon and reselling at joint profit or loss. It was held to be a conversion *out and out;* and upon one of them dying, his share in the real estate passed to his personal representatives.[2]

§ 905. **American Rule of Survivorship and Descent.** — In this country, as formerly in England, the doctrine of survivorship is almost universally limited by the extent to which equity stamps the character of personalty upon such estates, and that is so far as and no farther than they are required to pay partnership debts. If, therefore, one of two partners owning real estate dies, the survivor has an equitable lien upon the share of the deceased, which takes precedence of any claim for dower or of heirs, to have the same applied, if necessary, to the payment of the outstanding debts of the partnership, or to reimburse the survivor if he shall have paid more than his share of the partnership indebtedness.[3] And if the surviving partner be himself insolvent, his assignees may avail themselves of the partnership real estate, if needed for the payment of the company debts, and to aid in this they may require the widow and heirs of the deceased to execute proper deeds of release.[4]

§ 906. **Disappearance of Partnership Estate — Legal Character of Surplus.** — And, as would naturally be inferred from the premises above stated, whatever remains of such partnership real estate after the debts of the company shall have been dis-

[1] Tud. Cas. 721. See also Rice *v.* Barnard, 20 Vt. 479 ; Lang *v.* Waring, 17 Ala. 145.

[2] Darby *v.* Darby, 3 Drewry, 495, in 1856 ; Essex *v.* Essex, 20 Beav. 442. See the comments on this case, 98 Mass. 114 ; 1 White & T. Cases in Equity (4th ed.), 192, 193, and cases there collected. The English rule is adopted in Kentucky. Cornwall *v.* Cornwall, 6 Bush, 372 ; Louisville Bank *v.* Hall, 8 Bush, 678. And see Pierce *v.* Trigg, 10 Leigh, 406.

[3] Burnside *v.* Merrick, 4 Met. 537 ; Dyer *v.* Clark, 5 Met. 562 ; Smith *v.* Jackson, 2 Edw. Ch. 28 ; Fairchild *v.* Fairchild, 64 N. Y. 471 ; Watkins, Conv. 167, 168 ; Howard *v.* Priest, 5 Met. 585 ; Buffum *v.* Buffum, 49 Me. 108 ; Loubat *v.* Nourse, 5 Fla. 350 ; Scruggs *v.* Blair, 44 Miss. 406.

[4] Winslow *v.* Chiffelle, Harper, Eq. 25 ; 2 Spence, Eq. Jur. 209 ; Story, Eq. Jur. §§ 674, 675 ; Delmonico *v.* Guillaume, 2 Sandf. Ch. 366 ; Willett *v.* Brown, 65 Mo. 138 ; Shanks *v.* Klein, 104 U. S. 18.

charged, is held in common, at once subject to dower or curtesy, and goes to heirs or devisees accordingly,[1] and is subject to partition.[2]

[1] Burnside *v.* Merrick, 4 Met. 537; Howard *v.* Priest, 5 Met. 586; Bishop *v.* Sumner, 2 Barb. Ch. 163; Buckley *v.* Buckley, 11 Barb. 43; Tillinghast *v.* Chaplin, 4 R. I. 173; Dilworth *v.* Mayfield, 36 Miss. 40; Piper *v.* Smith, 1 Head, 93.

[2] Patterson *v.* Blake, 12 Ind. 436; Loubat *v.* Nourse, 5 Fla. 363; Foster's Appeal, 22 Am. L. Reg. 300 and note.

CHAPTER XXXVII.

JOINT MORTGAGES.

§ 907. Nature of joint mortgages to secure joint debts.
908. Parties to foreclose such mortgages.
909. Joint mortgages to secure several debts.
910. Effect of foreclosure.

§ 907. **Nature of Joint Mortgages to secure Joint Debts.** — In England and in most of the States the interest of a mortgagee in lands is regarded as an estate in lands, but so far partaking of the nature of the debt thereby secured, that, for purposes of remedy and enforcement of the same, the doctrine of survivorship applies as well to the estate as the debt; and this extends to the assignment of a mortgage to two trustees.[1]

§ 908. **Parties to foreclose such Mortgages.** — If, in such a case, either of the mortgagees dies, the survivors may proceed in their own name, and do whatever is necessary to foreclose the mortgage; and for that purpose they have a right to the possession of the mortgage and notes, without making the heir or personal representative of their co-mortgagee a party.[2]

§ 909. **Joint Mortgages to secure Several Debts.** — But if the debts secured by the mortgage belong in severalty to the different mortgagees named, they become, in such case, tenants in common and not joint-tenants as to such estate, without the right of survivorship; and if, after the debt of one shall have been satisfied, the other dies, his representatives, and not the survivor or survivors, would be the only proper parties to proceedings to enforce the mortgage.[3]

[1] Webster *v.* Vandeventer, 6 Gray, 428.

[2] Appleton *v.* Boyd, 7 Mass. 131; Kinsley *v.* Abbott, 19 Me. 430; Martin *v.* M'Reynolds, 6 Mich. 72; Cote *v.* Dequindre, Walker, Ch. 64.

[3] Burnett *v.* Pratt, 22 Pick. 557; 2 Dane, Abr. 226; Brown *v.* Bates, 55 Me. 522.

§ 910. **Effect of Foreclosure.** — As soon, however, as the mortgage is foreclosed, though the debt may have been a joint one, the mortgagees become tenants in common of the estate, the share of each being in proportion to his share of the debt.[1]

[1] Goodwin *v.* Richardson, 11 Mass. 469; Deloney *v.* Hutcheson, 2 Rand. 183; Donnels *v.* Edwards, 2 Pick. 617; Tud. Cas. 721; Pearce *v.* Savage, 45 Me. 90; Kinsley *v.* Abbott, 19 Me. 430.

CHAPTER XXXVIII.

ESTATES IN ENTIRETY.

§ 911. Nature of estates by entirety.
912. Survivorship — Partition.
913. Effect of husband's conveyance.
914. Husband and wife may be tenants in common.
915. American law.
916. Effect of divorce.

§ 911. **Nature of Estates by Entirety.** — A peculiar joint estate is that which belongs to a husband and wife, where the same is conveyed to them as such. If a man and woman, tenants in common, marry, they still continue to hold in common.[1] But if the estate is conveyed to them originally as husband and wife, they are neither tenants in common nor properly joint-tenants, though having the right of survivorship, but are what are called tenants by entirety. While such estates have, like a joint-tenancy, the quality of survivorship, they differ from that in this essential respect, that neither can convey his or her interest so as to affect the right of survivorship in the other. They are not seised, in the eye of the law, of moieties, but of entireties.[2]

[1] 1 Prest. Est. 434; Co. Lit. 187 *b*; Ames *v.* Norman, 4 Sneed, 683, 696; McDermott *v.* French, 15 N. J. Eq. 80; Babbit *v.* Scroggin, 1 Duv. 272.

[2] 1 Prest. Est. 131; 2 Flint. Real Prop. 527; Tud. Cas. 730; Shaw *v.* Hearsey, 5 Mass. 521; Fox *v.* Fletcher, 8 Mass. 274; Draper *v.* Jackson, 16 Mass. 480; Brownson *v.* Hull, 16 Vt. 309; Harding *v.* Springer, 14 Me. 407; Fairchild *v.* Chastelleux, 1 Penn. St. 176; Den *v.* Branson, 5 Ired. 426; Taul *v.* Campbell, 7 Yerg. 319; Cord, Mar. Women, § 107; Rogers *v.* Grider, 1 Dana, 242; Doe *v.* Howland, 8 Cow. 277; 2 Kent, Com. 132; Torrey *v.* Torrey, 14 N. Y. 430; Zorntlein *v.* Bram, 100 N. Y. 12; Ames *v.* Norman, 4 Sneed, 683; Wright *v.* Saddler, 20 N. Y. 320. See Vt. Stat. 1894, § 2202; Davis *v.* Clark, 26 Ind. 424; Ketchum *v.* Walsworth, 5 Wis. 95; Babbit *v.* Scroggin, 1 Duv. 272; Wales *v.* Coffin, 13 Allen, 215; Lux *v.* Hoff, 47 Ill. 425; Mariner *v.* Saunders, 10 Ill. 124; McCurdy *v.* Canning, 64 Penn. St. 39; Hemingway *v.* Scales, 42 Miss. 1; Marburg *v.* Cole, 49 Md. 402; Hall *v.* Stephens, 65 Mo. 670; Fisher *v.* Provin, 25 Mich. 350.

§ 912. **Survivorship — Partition.** — In such cases, the survivor does not take as a new acquisition, but under the original limitation, his estate being simply freed from participation by the other;[1] so that if, for instance, the wife survives and then dies, her heirs would take to the exclusion of the heirs of the husband.[2] Nor can partition be made of the estate.[3]

§ 913. **Effect of Husband's Conveyance.** — If the husband convey the entire estate during coverture, and die, his conveyance will not have affected her rights of survivorship to the entire estate. But if, in such case, the husband survive, his conveyance becomes as effective to pass the whole estate as it would have been had the husband been sole seised when he conveyed.[4] And during coverture, the husband has the entire control of the estate, and the same is liable to be seized by his creditors during his life.[5] But if the husband's creditors levy upon the estate, it survives to the wife on the death of the husband, as if no such levy had been made.[6] And even where the husband mortgaged half the estate for the support of self and wife, and she joined in the deed releasing her dower and homestead, it was held to be of no avail to bar her right as survivor upon the death of the husband, since her release of dower conveyed nothing; nor was she estopped by the mortgage, because, being a *feme covert*, she did not bind herself personally.[7] By the common law, if a husband by fine or feoffment conveyed land in fee which he held in the right of his wife, including estates held in entirety, it worked a discontinuance of her estate, and, at his death, she or her heirs were driven to an action to recover it. To obviate this, the statute 32 Hen. VIII. c. 28, § 6, provided that such conveyance should not work a discontinuance, but that at the death of the husband the wife or her heirs might enter upon the inheritance, without being driven to an action. This statute was once re-enacted, and still seems to be in force in

1 Watkins, Conv. 170 ; Tud. Cas. 730.
2 1 Prest. Est. 132.
3 Bennett *v.* Child, 19 Wis. 362.
4 1 Prest. Est. 135 ; Ames *v.* Norman, 4 Sneed, 683.
5 Barber *v.* Harris, 15 Wend. 615 ; Bennett *v.* Child, 19 Wis. 362, 365.
6 French *v.* Mehan, 56 Penn. St. 286.
7 Pierce *v.* Chase, 108 Mass. 258.

New York. It is in force in Tennessee, in Massachusetts, and has been re-enacted in Kentucky, and such is the effect of the statutes in New Jersey. In Tennessee, the wife has seven years after the husband's death in which to enter or bring her action. In Kentucky, she has twenty years. Nor has the tenant, in such case, any right to a notice to quit before proceedings are instituted to remove him. He is not even tenant at sufferance, as the relation of landlord and tenant did not subsist between him and the survivor.[1] If there be a divorce of the wife from the husband, she is restored to a moiety of the estate, during the lives of the two, with the right of survivorship upon his death. But such divorce cannot disturb a conveyance of the estate already made by the husband. So long as the husband lives, such conveyance will be good.[2]

§ 914. **Husband and Wife may be Tenants in common.** — It is always competent, however, to make husband and wife tenants in common, by proper words, in the deed or devise by which they take, indicating such an intention.[3] And if an estate be made to a husband and wife and a third person, the shares of each will depend upon the kind of estate the husband and wife take. If there is nothing to indicate a tenancy in common, they together would take one half by entirety, and the third person the other half, to be held in common;[4] whereas, if they take in common, then each is entitled to one third in common and undivided. And in the case supposed, if their connection with a third person was that of a joint-tenancy, and he were to die, the husband and wife would, by their survivorship, take the whole estate by entirety.[5] Where a conveyance was to a husband and wife and their six children by name, it was held that the interest of the tenants was divisible into seven parts, of which the husband and wife held one by entirety, undivided and in common with the other six parts undivided, to which the several children were entitled.[6]

[1] Co. Lit. 326 *a*; 2 Kent, Com. 133 and note; Miller *v.* Miller, Meigs, 492, 493; Miller *v.* Shackleford, 4 Dana, 264, 277; Bruce *v.* Wood, 1 Met. 542.

[2] Ames *v.* Norman, 4 Sneed, 683.

[3] McDermott *v.* French, 15 N. J. Eq. 81.

[4] Hall *v.* Stephens, 65 Mo. 670; Hulet *v.* Inlow, 57 Ind. 412.

[5] 1 Prest. Est. 132; 2 Flint. Real Prop. 327.

[6] Barber *v.* Harris, 15 Wend. 615.

§ 915. **American Law.** — The law of this country is not, however, uniform as to this doctrine of entirety. In Ohio, where there never was any joint-tenancy with a right of survivorship, it is held that a devise to a husband and wife and their heirs makes them tenants in common, and such is the effect of a conveyance to husband and wife of an equitable estate.[1] In Connecticut, a husband and wife, in such a case, are considered joint-tenants, and not tenants in entirety.[2] In Virginia, if an estate of inheritance is devised to husband and wife, upon the death of either, his or her share descends to heirs, subject to debts, rights of curtesy, or of dower, as the case may be.[3] In Rhode Island and Iowa such an estate in husband and wife is a tenancy in common, without the right of survivorship,[4] unless the contrary is expressed in the grant. And while it has been generally held that the statutes abolishing joint-tenancies, or changing these into tenancies in common, do not apply to tenancies by entirety,[5] yet, by express provision,[6] or by implication from the statutes giving married women control of their own property, these have in several States been reduced to tenancies in common.[7] In Indiana, and perhaps in some other States, while tenancy by entirety is still held to exist, notwithstanding the married women's acts, the common law incident of control of the joint property by the husband during coverture, or its alienability during the same period by his act, or liability for his debts, is denied.[8] In New York the continuance of this species of tenancy has been affirmed after some fluctuations of

[1] Sergeant *v.* Steinberger, 2 Ohio, 305; Wilson *v.* Fleming, 13 Ohio, 68.

[2] Whittlesey *v.* Fuller, 11 Conn. 337, 341.

[3] Code 1887, §§ 2430, 2431.

[4] Gen. Stat. 1896, c. 201, § 1; Hoffman *v.* Stigers, 28 Iowa, 302.

[5] Rogers *v.* Grider, 1 Dana, 242; Babbit *v.* Scroggin, 1 Duv. 272.

[6] Elliott *v.* Nichols, 4 Bush, 502.

[7] Clark *v.* Clark, 56 N. H. 105; Cooper *v.* Cooper, 76 Ill. 57, following the act of 1861, and distinguishing Lux *v.* Hoff, 47 Ill. 425, as prior to that statute; Mass. St. 1885, c. 237; Pray *v.* Stebbins, 141 Mass. 219.

[8] Arnold *v.* Arnold, 30 Ind. 305; Chandler *v.* Cheney, 37 Ind. 391, nothing passes by husband's deed; Davis *v.* Clark, 26 Ind. 424; Montgomery *v.* Hickman, 62 Ind. 598; Patton *v.* Rankin, 68 Ind. 245, or can be taken on execution by his creditors. So in New York, and perhaps Mississippi, it is left undetermined whether the husband can alien his joint interest during coverture. Bertles *v.* Nunan, 92 N. Y. 152; McDuff *v.* Beauchamp, 50 Miss. 531.

decision,[1] and the same rule has been laid down in Michigan, Mississippi, Arkansas, and Maryland, at least to the extent of the right of survivorship.[2] While in Pennsylvania, Missouri, New Jersey, and Wisconsin the tenancy exists with all its common law incidents.[3]

§ 916. **Effect of Divorce.** — The existence of this estate is entirely dependent upon the marriage relation. A termination of the marriage by divorce brings the estate to an end; and as the parties can no longer hold in joint seisin they must hold by moieties. Divorce, therefore, resolves an estate by entirety into a joint tenancy or a tenancy in common, according to the policies and laws of the several States.[4]

[1] In Goelet *v.* Gori, 31 Barb. 314; Farmers' Bk. *v.* Gregory, 49 Barb. 155; Miller *v.* Miller, 9 Abbott, Pr. N. S. 444; Freeman *v.* Barber, 3 Thomps. C. 574; Beach *v.* Hollister, 3 Hun, 519, it was held still to exist; but in Meeker *v.* Wright, 76 N. Y. 262, followed by Feely *v.* Buckley, 28 Hun, 451, it was declared inconsistent with the married women's statutes. But these latter cases have since been overruled in Bertles *v.* Nunan, 92 N. Y. 152; Zorntlein *v.* Bram, 100 N. Y. 12.

[2] Fisher *v.* Provin, 25 Mich. 350; McDuff *v.* Beauchamp, 50 Miss. 531; Robinson *v.* Eagle, 29 Ark. 202; Marburg *v.* Cole, 49 Md. 402.

[3] Bates *v.* Seely, 46 Penn. St. 248; French *v.* Mehan, 56 Penn. St. 289; Washburn *v.* Burns, 34 N. J. 18; Hall *v.* Stephens, 65 Mo. 670; Bennett *v.* Child, 19 Wis. 362.

[4] 2 Bishop, Mar. & Div. (6th ed.) § 716; 2 Bright, Hus. & Wife, 365; Stelz *v.* Shreck, 128 N. Y. 263; s. c. 28 N. E. Rep. 510; s. c. 13 L. R. A. 325; Harrer *v.* Wallner, 80 Ill. 197; Enyeart *v.* Kepler, 118 Ind. 34; s. c. 10 Am. St. Rep. 94; s. c. 20 N. E. Rep. 539.

CHAPTER XXXIX.

PARTITION.

§ 917. Partition at common law and by statute.
918. The right to partition.
919. The power of compelling partition.
920. Proceedings at common law; in chancery.
921. How partition made; its effect.
922. Who may have partition.
923. Disseisin a bar to partition.
924. Of the petitioner's estate.
925. Parties.
926. Division of the property.
927. Division in special cases.
928. Partition of decedents' estates.
929. Parol partition.
930. Exclusive possession after parol partition.
931. Failure of title after partition — Calling in aid.
932. Partitioner's estoppel.
933. Partitioner's warranty.
934. Eviction by paramount title after partition.

§ 917. **Partition at Common Law and by Statute.** — At common law no owner of any of these joint-estates, except parceners, had a right to have partition thereof made against the will of his co-tenant. The right of having partition in the excepted estates gave rise to the name of parcenary. And for this or some other reason, in some of the States it has been held that a parol partition of their estate between parceners, if followed by possession, is as good and effectual as if made by deed. It is apprehended that this is confined to States where coparcenary at common law is still retained, and would not extend to States where heirs take as tenants in common.[1] The statute 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, provided for a compulsory process of partition by a writ or action

[1] Coles *v.* Wooding, 2 Pat. & H. (Va.) 189, 197; Wildey *v.* Bonney, 31 Miss. 644, 652.

at common law.[1] This form of proceeding continued in England to be one of the forms by which partition could be effected, until the statute 3 & 4 Wm. IV. c. 27, by which it was abolished, and the statutes by which it was created have been re-enacted in most of the States. But in England and this country it had become practically obsolete many years ago.[2]

§ 918. **The Right to Partition.** — There is still a power to compel partition which may be readily applied in both countries. In England it is done through chancery. In the several States of this country the procedure is regulated by statute. But in some form or other, the right of having partition made is incident to an ownership in joint-tenancy as well as to estates in common.[3] But it is competent for joint owners of land to have their estate so created as to prevent partition thereof being made except by mutual consent, as where several joined in purchasing an estate on which to erect and maintain a hotel, and had a clause inserted in the deed by which they acquired their title, prohibiting them from having partition thereof made. They were thereby estopped from maintaining a process for partition.[4] But where, by the terms of the grant of a parcel of land, it was to be occupied in common as a yard by the grantor and grantee and their heirs and assigns, it was held that partition of the premises might be made, giving to each an easement in the land of the other so as to serve the purposes of the grant.[5] But where one tenant in common owned one undivided part in his own right in common with another part of which he and others were trustees, it was held he could not have partition of the estate.[6]

[1] 2 Flint. Real Prop. 332 ; Story, Eq. Jur. § 647.

[2] 4 Kent, Com. 364 ; Champion *v.* Spencer, 1 Root, 147 ; Cook *v.* Allen, 2 Mass. 462 ; Witherspoon *v.* Dunlap, 1 McCord, 546 ; M'Kee *v.* Straub, 2 Binn. 1 ; Wms. Real Prop. 81, 115.

[3] Mitchell *v.* Starbuck, 10 Mass. 5 ; Witherspoon *v.* Dunlap, Harper, 390 ; Potter *v.* Wheeler, 13 Mass. 504 ; Ledbetter *v.* Gash, 8 Ired. 462 ; Hanbury *v.* Hussey, 5 E. L. & Eq. 81 ; Higginbottom *v.* Short, 25 Miss. 160 ; Holmes *v.* Holmes, 2 Jones, Eq. 334. See Coleman *v.* Coleman, 19 Penn. St. 100 ; Hoyt *v.* Kimball, 49 N. H. 322.

[4] Hunt *v.* Wright, 47 N. H. 399, 401 ; see also Fisher *v.* Dewerson, 30 Met. 546.

[5] Fisher *v.* Dewerson, *supra ;* Hoyt *v.* Kimball, 49 N. H. 322.

[6] Winthrop *v.* Minot, 9 Cush. 405.

§ 919. **This Power of compelling Partition** has been exercised in England by chancery ever since the time of Elizabeth.[1] It may be done in chancery in several of the States, in most if not all of which there are also modes provided by statute for causing partitions to be made.[2] In New York a wife, owning land as tenant in common with her husband, may have a bill in equity for partition of the same.[3] The act of making partition through chancery is done by commissioners appointed for the purpose, who return their doings into court, and, in order to make it effectual, mutual conveyances to each other by the co-tenants are required.[4] And if it becomes necessary, in order to equalize the partition, the commissioners may require the payment of money by one co-tenant to another, called owelty of partition.[5] And if one co-tenant has made improvements upon the estate, equity may so divide it as to give these to the tenant who made them, although, at law, he would have no right of action to recover their value.[6] But under proceedings at law the commissioners cannot settle contested questions of title between the parties; such questions are to be settled at the original hearing: nor have they power to award that buildings standing upon the premises are the property of some one of the tenants in common, and to set the same to him as his own.[7] In Illinois, however, if one co-tenant make improvements upon the common estate, the court directs the commissioners to set the improved part to him without charging him for such improvements.[8]

§ 920. **Proceedings at Common Law; in Chancery.** — When partition was made upon proceedings at common law, it was

[1] Story, Eq. Jur. § 647.

[2] Whitten *v.* Whitten, 36 N. H. 326; Patton *v.* Wagner, 19 Ark. 233; Bailey *v.* Sisson, 1 R. I. 233; Spitts *v.* Wells, 18 Mo. 468; Adam *v.* Ames Iron Co., 24 Conn. 230; Greenup *v.* Sewell, 18 Ill. 53. In Indiana the proceedings are in law, and not in equity. Wilbridge *v.* Case, 2 Carter (Ind.), 36.

[3] Moore *v.* Moore, 47 N. Y. 469.

[4] Story, Eq. Jur. § 650.

[5] Story, Eq. Jur. § 654.

[6] Green *v.* Putnam, 1 Barb. 500. See also Crafts *v.* Crafts, 13 Gray, 360; Thorn *v.* Thorn, 14 Iowa, 55; Robinson *v.* McDonald, 11 Tex. 385.

[7] Gourley *v.* Woodbury, 43 Vt. 89.

[8] Dean *v.* O'Meara, 47 Ill. 120; Kurtz *v.* Hibner, 55 Ill. 521. See a like doctrine in Kentucky. Borah *v.* Archers, 7 Dana, 177.

done by a sheriff and jury, who set out to each his proper share, and this was binding upon the parties without the formality of mutual conveyances, as required when made in chancery.[1] But chancery did not act in case the title to the land was in dispute. It required the question of title to be first settled at law.[2] Proceedings in partition, like real actions, generally are local, and must be had in the county in which the land lies which is the subject of division.[3] A petition for partition is a proceeding *in rem*.[4] In a writ of partition all the co-tenants must be named, and partition must be made amongst them, the share of each must be stated, and no partition can be made where any of the co-tenants are unknown, or their shares cannot be stated. But in Massachusetts one co-tenant can have his share set off, leaving the other co-tenants to have their shares set off by a new process, and this though the others are unknown. The essential thing in such a process is, that the petitioner should have an estate in possession in common with some other person. It is no objection to the proceeding that there is a contingent remainder in another in some portion of the estate. But a remainder-man cannot have partition, and if he has a share in possession, and one in remainder, he may have the first set off without effecting his right to the other share. As to the two he is regarded as a separate tenant. It is no objection to maintaining partition that the petitioner's share is subject to a mortgage if the mortgagor is in possession.[5] By the law of the same State, a tenant in common for life may have partition, and it is no objection to the process that the petitioner holds his estate subject to a condition if the same has not been broken.[6]

§ 921. **How Partition made; its Effect.** — It is not competent for a tenant in common to enforce partition as to a part of the

[1] Story, Eq. Jur. §§ 652, 654.

[2] 2 Daniels, Ch. (Perk. ed.) 1326, n.; 4 Kent, Com. 365; Hosford *v.* Merwin, 5 Barb. 51; McCall *v.* Carpenter, 18 How. 297; Shearer *v.* Winston, 33 Miss. 149; Tabler *v.* Wiseman, 2 Ohio St. 207; Obert *v.* Obert, 10 N. J. Eq. 98.

[3] Bonner, Petitioner, 4 Mass. 122; Brown *v.* McMullen, 1 Nott & McC. 252; Peabody *v.* Minot, 24 Pick. 333.

[4] Corwithe *v.* Griffing, 21 Barb. 9.

[5] Taylor *v.* Blake, 109 Mass. 513.

[6] Judkins *v.* Judkins, 109 Mass. 181.

common estate. He must go for a partition of the entire estate if he would divide any part.[1] And where the commissioners, in dividing the land, laid an open passage-way through it, and then set off the respective shares of the co-tenants, bounding them by this passage-way, and giving to each an easement of way over the open passage, to be used by them in common, it was held to be a good partition; the share of each would be bounded by the centre line of this way.[2] But two or more of several tenants in common may join in having their respective interests set off together from the other shares of their co-tenants. Or one or more of the tenants may have their shares set off, leaving the rest of the common estate undivided.[3] This would be so, though the parties, other than the petitioners, are unknown. The effect of a partition is like that of a judgment in establishing the titles of the respective tenants. It requires no deeds between the parties to make good the titles.[4] A judgment in partition, settling and confirming the shares and interests of the several parties, is equivalent to a conveyance, and is to be construed by the same rules as ordinary conveyances.[5]

§ 922. **Who may have Partition.** — Where tenants in common covenanted that a certain part of the premises should forever remain to be occupied by them and their heirs and assigns as a yard, it was no bar to having a partition of the premises, but the right to this occupation in the nature of an easement will remain after as before the partition.[6] But if, in a deed to two persons, it is recited at the close of the grant that the premises are "to remain in common and undivided," such recital would not prevent either of the parties from having partition by process of law.[7] But a condition that partition should never be made of the premises granted would be good.[8] By the statute 31 Henry VIII., none but tenants of the freehold

[1] Duncan *v.* Sylvester, 16 Me. 388; Colton *v.* Smith, 11 Pick. 311; Bigelow *v.* Littlefield, 52 Me. 24.

[2] Clark *v.* Parker, 106 Mass. 554.

[3] Ladd *v.* Perley, 18 N. H. 396; Abbott *v.* Berry, 46 N. H. 389.

[4] Hassett *v.* Ridgley, 49 Ill. 201.

[5] Hoffman *v.* Stigers, 28 Iowa, 302.

[6] Fisher *v.* Dewerson, 3 Met. 544; Hoyt *v.* Kimball, 42 N. H. 324.

[7] Spalding *v.* Woodward, 53 N. H. 573.

[8] Hunt *v.* Wright, 47 N. H. 396; *post*, § 944.

who have estates of inheritance could have partition, and only against tenants of the freehold. By that of 32 Henry VIII. tenants for life or years might have partition, but not to effect the reversioner or remainder-man.[1] Where, during the pendency of proceedings for partition, one co-tenant mortgaged his interest, it was held that the mortgage attached to his property as soon as set out to the mortgagor, and the same rule would apply if the conveyance had been in fee.[2] Within the rule above stated, a tenant by the curtesy initiate may have partition.[3]

§ 923. **Disseisin a Bar to Partition.** — A petition for partition ordinarily lies only in favor of one who has a seisin and right of immediate possession,[4] and a disseisin or adverse possession negatives the community of possession upon which the right to partition depends.[5] Partition is not a process to try questions of title if the petitioner is out of possession. If, therefore, another than the petitioner is in adverse possession for however short a time, he cannot sustain the petition, so that one co-tenant, by conveying the whole estate to a stranger, may compel his co-tenant to regain his seisin and possession before he can bring process for partition.[6] Thus, one claiming a share of an estate for an alleged breach of condition cannot have partition until he shall have regained his seisin by an entry upon the premises.[7] A judgment for partition, when

[1] Co. Lit. 167; Mussey *v.* Sanborn, 15 Mass. 155; Austin *v.* Rutland R. R., 45 Vt. 215.

[2] Westervelt *v.* Haff, 2 Sandf. Ch. 98; Baird *v.* Corwin, 17 Penn. St. 462.

[3] Riker *v.* Darke, 4 Edw. Ch. 668.

[4] Bonner *v.* Kennebeck Purch., 7 Mass. 475; Rickard *v.* Rickard, 13 Pick. 251; Wells *v.* Prince, 9 Mass. 508; Bradshaw *v.* Callaghan, 8 Johns. 558; Brownell *v.* Brownell, 19 Wend. 367; Barnard *v.* Pope, 14 Mass. 434; Miller *v.* Dennett, 6 N. H. 109; Call *v.* Barker, 12 Me. 320; Stevens *v.* Enders, 13 N. J. 271; Whitten *v.* Whitten, 36 N. H. 326; Maxwell *v.* Maxwell, 8 Ired. Eq. 25; Hunnewell *v.* Taylor, 6 Cush. 472; Foust *v.* Moorman, 2 Carter (Ind.), 17; Tabler *v.* Wiseman, 2 Ohio St. 207; Lambert *v.* Blumenthal, 26 Mo. 471; Brock *v.* Eastman, 28 Vt. 658.

[5] Clapp *v.* Bromagham, 9 Cow. 530; Thomas *v.* Garvan, 4 Dev. 223. But in Massachusetts, it is held that a mere technical disseisin does not affect one tenant in common in maintaining partition, so long as he has a right to make an immediate entry. Marshall *v.* Crehore, 13 Met. 462; Fisher *v.* Dewerson, 3 Met. 544.

[6] Florence *v.* Hopkins, 46 N. Y. 184, 186.

[7] O'Dougherty *v.* Aldrich, 5 Denio, 385.

executed, is conclusive evidence that the part set off to one petitioner was a part of the premises held by the parties in common, nor would it be open to a former co-tenant to set up an easement in the part thus set off, upon the ground that he had enjoyed it adversely before such partition was made.[1]

§ 924. **Of the Petitioner's Estate.** — Partition, consequently, does not lie by tenants in common in reversion or remainder,[2] though in New York it may be made of an equitable estate,[3] and of a vested remainder by a statute of that State.[4] An outstanding right of dower in a widow, which has never been enforced, is no objection to a valid partition among those having the inheritance.[5] So the owners of an equity of redemption may have partition, if the mortgagee has not entered and taken possession under his mortgage.[6] But one co-tenant cannot have partition against another who holds a mortgage upon the whole estate, although it may not have been recorded.[7] But if partition has been made while there is an outstanding mortgage, attachment, or other lien upon the share of one of the co-tenants, it will conclude the one having such lien, and the same will attach to the part set off to the one against whom it exists.[8] But two mortgagees with simultaneous mortgages cannot have partition until after foreclosure of their mortgages.[9]

§ 925. **Parties.** — To give validity and effect to a partition, all persons interested should be made parties to the proceedings. Such parties and none others would be bound by the

[1] Edson *v.* Munsell, 12 Allen, 602.

[2] Culver *v.* Culver, 2 Root, 278; Ziegler *v.* Grim, 6 Watts, 106; Hodgkinson, Pet., 12 Pick. 374; Brown *v.* Brown, 8 N. H. 93; Robertson *v.* Robertson, 2 Swan, 197; Tabler *v.* Wiseman, 2 Ohio St. 207; Adam *v.* Ames Iron Co., 24 Conn. 230; Nichols *v.* Nichols, 28 Vt. 228; Hunnewell *v.* Taylor, 6 Cush. 472; Johnson *v.* Johnson, 7 Allen, 198.

[3] Hitchcock *v.* Skinner, 1 Hoffm. Ch. 21.

[4] Blakeley *v.* Calder, 15 N. Y. 617. So in Illinois and New Jersey. Scoville *v.* Hilliard, 48 Ill. 453; Hilliard *v.* Scoville, 52 Ill. 449; South *v.* Gaines, 38 N. J. Eq. 65.

[5] Bradshaw *v.* Callaghan, 8 Johns. 558; Motley *v.* Blake, 12 Mass. 280; Leonard *v.* Motley, 75 Me. 418.

[6] Call *v.* Barker, 12 Me. 320.

[7] Blodgett *v.* Hildreth, 8 Allen, 186; Fuller *v.* Bradley, 23 Pick. 9.

[8] Mass. Pub. Stat. c. 178, § 44.

[9] Ewer *v.* Hobbs, 5 Met. 1. *Contra*, Munroe *v.* Wallbridge, 2 Aik. 410.

judgment. Thus, before the statute bound mortgagees and attaching creditors of one co-tenant by a partition to which he is party, and gave a lien upon his property when set out to him, such mortgagee or attaching creditor was not bound by such partition commenced and perfected after the lien thus created was instituted, unless he was made a party to the proceedings.[1] And a partition where one of the co-tenants is a disseisor, or wrongfully claims a share of the estate, will not affect the rights of the disseisee, although such co-tenant is in possession of the premises, but when the disseisee regains his seisin he will be tenant in common with the rightful co-tenant.[2]

§ 926. **Division of the Property.** — It has been held in Massachusetts, that if the common estate consists of several parcels, it is not required in making partition that each parcel should be divided; the entire share of one of the co-tenants may be set off in one of the parcels, if the commissioners see fit.[3] The same rule applies in describing what is set off to a co-tenant upon partition made, as in making a deed from one to another. Thus the assignment of a *mill* to one carries with it the land on which it stands, and the appurtenant easements necessary to its full enjoyment.[4]

§ 927. **Division in Special Cases.** — In Vermont, the court refused to order a partition of an ore bed, or of a mill, mill-pond, and mill-yard, which formed one estate, because they were not subjects of partition.[5] And a partition made in New Hampshire, of a mill, by assigning to the co-tenants the alternate use of it for specified periods, was set aside as being unauthorized by law;[6] and such was held to be the case in Massachusetts,

[1] Colton *v.* Smith, 11 Pick. 311; Munroe *v.* Luke, 19 Pick. 39; Mass. Pub. Stat. c. 178, § 43; Cook *v.* Allen, 2 Mass. 462. See Purvis *v.* Wilson, 5 Jones (N. C.), 22; Kester *v.* Stark, 19 Ill. 328; Burhans *v.* Burhans, 2 Barb. Ch. 398; De Uprey *v.* De Uprey, 27 Cal. 332; Harlan *v.* Stout, 22 Ind. 488; Ross *v.* Cobb, 48 Ill. 114; Kilgour *v.* Crawford, 51 Ill. 249. Cf. Duke *v.* Hague, 15 W. No. Cas. 353.

[2] Dorn *v.* Beasly, 7 Rich. Eq. 84; Foxcroft *v.* Barnes, 29 Me. 128; Argyle *v.* Dwinel, 29 Me. 29. *Contra*, Mass. Pub. Stat. c. 178, § 35; Foster *v.* Abbot, 8 Met. 596.

[3] Hagar *v.* Wiswall, 10 Pick. 172. Cf. Hardin *v.* Lawrence, 40 N. J. Eq. 154.

[4] Munroe *v.* Stickney, 48 Me. 458.

[5] Conant *v.* Smith, 1 Aik. 67; Brown *v.* Turner, id. 350.

[6] Crowell *v.* Woodbury, 52 N. H. 613.

until a statute made provision for such a partition.[1] The court of California do not regard the water flowing in a ditch designed for mining purposes as a subject of partition by any mechanical division. And the only way in which the interests of such common owners can be divided is by making sale of the same.[2] But in New York, where there were several mills upon the same stream, partition was made by assigning a mill and mill-dam to one, with a privilege of flowing the land of the other above him, for the purpose of raising the necessary head of water.[3] In a case in Maine, where the common property was a cotton factory, the commissioners reported that it could not be divided, to be used for the purposes for which it was constructed, but might be for other uses, and the court required it to be done.[4] In some of the States, if the property is not susceptible of partition, the court may order it sold, and the proceeds divided.[5] In Massachusetts, if the premises cannot be divided, they may all be set to one, and he be required to pay the estimated value of his co-tenant's share to him.[6]

§ 928. **Partition of Decedents' Estates.** — In most of the States, in addition to the modes of effecting partition above mentioned, courts of probate jurisdiction have the power to cause partition to be made among the heirs or devisees of an estate which has come within the cognizance of the court.[7] In such case no deed of release of their several proportions by one heir or devisee to another is required, as the adjudication of the court, accepting and affirming the doings of the commissioners appointed to make the partition, is binding and conclusive. The partition must be of the entire estate and not of a part only,[8]

[1] Miller *v.* Miller, 13 Pick. 237; De Witt *v.* Harvey, 4 Gray, 486.

[2] McGillivray *v.* Evans, 27 Cal. 96.

[3] Hills *v.* Dey, 14 Wend. 204. See, as to special partition of mines and other indivisible hereditaments by means of resc . to equity, Adams *v.* Briggs Iron Co., 7 Cush. 361; Tyler *v.* Wilkinson, 4 Mason, 397; Belknap *v.* Trimble, 3 Paige, 577; De Witt *v.* Harvey, 4 Gray, 499; Story, Eq. Jur. § 656. See also, as to dividing water-power, Morrill *v.* Morrill, 5 N. H. 134; Hanson *v.* Willard, 12 Me. 142.

[4] Wood *v.* Little, 35 Me. 107.

[5] Royston *v.* Royston, 13 Ga. 425; Higginbottom *v.* Short, 25 Miss. 160.

[6] King *v.* Reed, 11 Gray, 490.

[7] Walton *v.* Willis, 1 Dall. 265; Witham *v.* Cutts, 4 Me. 31.

[8] Arms *v.* Lyman, 5 Pick. 210.

nor can it affect an alienee of one of the heirs or devisees who acquires his title before proceedings are commenced, as such alienee is not a party to the proceedings of settling the estate in the probate court.[1]

§ 929. **Parol Partition.** — No parol partition can be effectual unless accompanied by deeds from one co-tenant to the other, inasmuch as the statute of frauds applies to such cases.[2] But where two tenants in common made parol partition of land, it was held to be good and effectual against creditors and purchasers if it is followed by separate, open and notorious possession. And such possession would be notice of an existing deed, though it had not been recorded.[3] But in one case in New York, the court gave practical effect to a partition made by co-tenants by parol between themselves, which was followed by a separate occupation by each tenant for several, though less than twenty, years. One of these having made expensive improvements upon the part set to him, and another of the original co-tenants having sought to enforce a new partition, the court refused to allow this partition to be disturbed.[4] But in New Hampshire and Massachusetts there is a class of *quasi* corporations known as proprietors of common lands, which may make partition of their lands by a simple vote properly made and recorded without any deed.[5]

§ 930. **Exclusive Possession after Parol Partition.** — But although a parol partition between tenants in common may not, for the reasons stated, affect the legal title of the several owners, where it is followed by a possession in conformity with such partition it will so far bind the possession as to give to each co-tenant the rights and incidents of an exclusive possession of his purparty.[6] Exclusive possession by one tenant in

[1] Pond *v.* Pond, 13 Mass. 413; Cook *v.* Davenport, 17 Mass. 345.

[2] Porter *v.* Hill, 9 Mass. 34; Porter *v.* Perkins, 5 Mass. 232; Snively *v.* Luce, 1 Watts, 69; Gratz *v.* Gratz, 4 Rawle, 411; Gardiner Mg. Co. *v.* Heald, 5 Me. 384; Dow *v.* Jewell, 18 N. H. 354; Den *v.* Longstreet, 18 N. J. L. 414. But it is otherwise in Texas. Stuart *v.* Baker, 17 Tex. 420.

[3] Manly *v.* Pettee, 38 Ill. 128–132.

[4] Wood *v.* Fleet, 36 N. Y. 591. See also Conkling *v.* Brown, 57 Barb. 265.

[5] Coburn *v.* Ellenwood, 4 N. H. 99; Folger *v.* Mitchell, 3 Pick. 396; Adams *v.* Frothingham, 3 Mass. 352; Corbett *v.* Norcross, 35 N. H. 99; Rothwell *v.* Dewees, 2 Black, 613.

[6] Jackson *v.* Harder, 4 Johns. 202, 212; Jackson *v.* Vosburg, 9 Johns. 276;

common of a particular part of the estate, accompanied by a denial of his co-tenant's right of possession in the part thus occupied, may grow into a legal presumption of partition having been made.[1] And in some cases the law will infer this from the mere sole and exclusive occupation of such part, if continued a sufficient length of time, — in Pennsylvania twenty-one years, and in Kentucky twenty years.[2]

§ 931. **Failure of Title after Partition — Calling in Aid.** — It has been shown that so close is the confidential relation of joint tenants, and, in most instances, of tenants in common, the one to the others, that an adverse title or incumbrance purchased by one co-tenant enures to the benefit of all.[3] But how far this principle shall be applied after partition made, depends upon the circumstances of the cases as they arise. Thus, supposing partition to be made by mutual deeds of release without fraud, and the title to some part of the premises fails, the loss, as a general proposition, falls on the party whose property is immediately affected by it.[4] But by the statute of 31 Henry VIII. it was expressly provided that tenants in common, between whom partition has been made by a writ of partition, may have the aid of each other "to deraign the warranty" as to the estate; that is, to avail themselves of the benefit of the general warranty which had attached to the estate, by rendering it effectual for the protection of, or compensation for, the land which should be adversely demanded or recovered.[5] This proposition may perhaps be made a little more intelligible by the analogy there is between the case of such tenant in common, and that of a tenant having the right to call "in aid" another to protect his title. Thus, for instance, if a tenant for life is sued in a writ of entry by some one claiming the inheritance, as he is not sup-

Slice *v.* Derrick, 2 Rich. 627, 629; Piatt *v.* Hubbel, 5 Ohio, 213; Corbin *v.* Jackson, 14 Wend. 619; Keay *v.* Goodwin, 16 Mass. 1, 3; Rider *v.* Maul, 46 Penn. St. 376; Maul *v.* Rider, 51 Penn. St. 377. And see Hazen *v.* Barnett, 50 Mo. 507, that it gives an equitable title. So Tomlin *v.* Hilyard, 43 Ill. 302.

[1] Lloyd *v.* Gordon, 2 Har. & McH. 254.

[2] Gregg *v.* Blackmore, 10 Watts, 192; Drane *v.* Gregory, 3 B. Mon. 619.

[3] *Ante*, §§ 859, 882.

[4] Beardsley *v.* Knight, 10 Vt. 185; Weiser *v.* Weiser, 5 Watts, 279.

[5] Cowel, Interp. Verb. "Deraign," Morrice's Case, 6 Rep. 12; Allnatt, Part. 161, 163; 6 Dane, Abr. 5, where it is said the Stat. 31 Henry VIII. is a part of Massachusetts common law; and so in Tennessee, 8 Humph. 285.

posed to be cognizant of the full title, he properly calls upon the reversioner to aid him in making defence. So if one has purchased the inheritance, and the vendor has warranted the title, and he is sued, in such an action he may call upon, or, in technical terms, "vouch in," his warrantor to defend the title.[1] But as tenants in common, after partition made, are not considered as holding under each other, so that, if one is sued in respect to his title to his property, he can call the others in aid, or vouch them in to defend as warrantors, they are all considered as holding under the original general or paramount warrantor. And when either of them was sued in respect to his title, he might require the aid of his former co-tenants in calling upon their general or paramount warrantor to make good his warranty, or make compensation.[2]

§ 932. **Partitioner's Estoppel.** — Applying this common law duty of co-tenants to aid each other in protecting what had been a common estate, even after partition made, the law holds it incompatible with their duty towards each other for either to become the demandant in a suit to recover any portion of the land by a paramount title, and thus to place himself in antagonism to his co-tenants and their common warrantor.[3]

§ 933. **Partitioner's Warranty.** — And where partition has been made by law, each partitioner becomes a warrantor to all the others to the extent of his share, so long as the privity of estate continues between them. And inasmuch as a warrantor cannot claim against his own warranty, no tenant after partition made can set up an adverse title to the portion of another, for the purpose of ousting him from the part which has been parted off to him.[4] When partition has been made, the tenant, to whom a part has been set out, is regarded in law as a purchaser for value of the same.[5]

[1] Stearns, Real Act. 99, 131; Booth, Real Act. 60.

[2] Maurice's Case, 6 Rep. 12; Allnatt, Part. 156–164; 1 Prest. Abs. 304; Sawyers *v.* Cator, 8 Humph. 256; Morris *v.* Harris, 9 Gill, 19; Dugan *v.* Hollis, 4 Md. Ch. 139; Co. Lit. 174 *a*. The warranty here spoken of is the ancient warranty of the common law, which never practically obtained in the United States. 4 Kent, Com. 470.

[3] Venable *v.* Beauchamp, 3 Dana, 326.

[4] Co. Lit. 174 *a*; Com. Dig. Parcener, C. 13; Venable *v.* Beauchamp, 3 Dana, 326.

[5] Campau *v.* Barnard, 25 Mich. 382.

§ 934. **Eviction by Paramount Title after Partition.** — If, after the partition has been made, one of the parties is evicted of his property by a paramount title, the partition as to him is defeated at his election, and he may enter upon the shares of the others as if none had been made, and have a new partition of the premises. But this right does not extend to the alienee of one of these tenants, because by such alienation the privity of estate between them and the holder of his share is destroyed. Nor can the alienee himself enter upon the shares of the other tenants in such a case and defeat the partition.[1] And if, in the case supposed, one co-tenant after partition is evicted by paramount title, he is not confined for his remedy to a new partition, but may rely upon his warranty and recover his recompense for his loss by an action thereon against his former co-tenant.[2]

[1] Co. Lit. 173 *b*; id. 174 *a*; Com. Dig. Parcener, C. 13; Feather *v.* Strohoecker, 3 Penn. 505.

[2] Com. Dig. Parcener, C. 14.

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